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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1981

No. 80-6614

RANDY GREENAWALT,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, Randy Greenawalt, through counsel, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arizona entered in this proceeding on March 3, 1981.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Arizona in this proceeding affirming Petitioner's resentence to death has been reported. State v. Greenawalt, ____Ariz.____, 624 P.2d 82B(1981). A copy of the opinion has been appended to this petition as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona affirming the order of the Yuma County Superior Court resentencing the Petitioner to death was entered on March 3, 1981. See Appendix A. This Petition is timely filed pursuant to Rule 22(1),

Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. The Courts of the State of Arizona violated the Due Process Clauses of the Fifth and Fourteenth Amendments in failing to appoint an expert to conduct a public opinion survey.

2. The Courts of the State of Arizona violated the Due Process Clauses of the Fifth and Fourteenth Amendments in limiting the use of an investigator for the Petitioner to matters presented to and approved by the Court.

3. The statements obtained from the Appellant by police investigators were taken in violation of Miranda v. Arizona and Appellant's Sixth Amendment right to counsel.

4. The Petitioner did not receive the type of fair trial mandated by the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States due to the extensive and prejudicial pretrial publicity and due to the publicity and the atmosphere surrounding the trial.

5. The Courts of the State of Arizona denied the Petitioner a fair trial as guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments in refusing to halt the Sheriff's searching of the jurors and in denying the Petitioner's motion for mistrial based upon such searches.

6. The imposition of the death penalty under any circumstances constitutes cruel and unusual punishment in violation of the provisions of the Eighth Amendment to the United States Constitution.

7. The Arizona Court's Watson Decision is unconstitutional because the mitigation section of the prior statute was not

severable from the remainder of the statute.

8. The decision of the Arizona Court in the Watson case was a prohibited exercise of the legislative power inviolation of Article 3 of the Constitution of the State of Arizona.

9. The Arizona death penalty as set forth in Watson is an Ex Post Facto law which is prohibited by Article I, Section 10, of the United States Constitution and by Article 2, Section 25, of the Constitution of the State of Arizona.

10. The Watson Decision constitutes a Bill of Attainder, judicially enacted prohibited by Article I, Section 10, of the United States Cosntitution.

11. The death penalty as recreated by Watson violates the principles of fundamental fairness embodied in the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

12. The death penalty as recreated by Watson contains no ascertainable standards by which to measure the relative weight of aggravating and mitigating circumstances and will, therefore, be wantonly, arbitrarily and freakishly imposed.

13. As applied by the Arizona Courts in the instant case, the Watson death penalty is unconstitutional because it improperly allocates the burden of proof upon the defendant for mitigating circumstances and requires an inadequate burden of proof for the prosecution as to aggravating circumstances.

14. The imposition of the death penalty upon a defendant who has been convicted solely upon a felony murder theory with no evidence of direct participation in the murder or even of intent that the victim should die is grossly disproportionate and violates the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS

Article I, Section 10, Constitution of the United States:

"No State shall . . . pass any Bill of Attainder, ex post facto Law . . . ."

Article VI, Constitution of the United States:

"This Constitution, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding."

Amendment V, Constitution of the United States:

"(N) or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . . ."

Amendment VI, Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to have the assistance of Counsel for his defense."

Amendment VIII, Constitution of the United States:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV, Constitution of the United States:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

Arizona Revised Statutes, Sec.1-246:

1-246. Penalty altered by subsequent law; effect

When the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law

shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed.

Section 5, Chapter 138, Thirty-First Arizona Legislature, First Regular Session, Arizona Revised Statutes, Sec. 13-454 (Renumbered A.R.S. Sec. 13-703 and modified effective October 1, 1978; modified effective May 1, 1979):

13-454. Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the Court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E and F, any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The pro-

secution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The Court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was impossible.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in

in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant commtted the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such duress as to constitute a defense to presecution.

3. He was a principal, under section 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person.

Section 10, Chapter 138, Thirty-First Arizona Legislature, First Regular Session:

Severability of sentence clause

In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprison-

ment without possibility of parole until the person has served a minimum of twenty-five calendar years.

Arizona Revised Statutes, Section 13-1673(b):

B. When a person is charged with a capital offense the court may on its own initiative and shall upon application of the defendant and a showing that the defendant is financially unable to pay for such services, appoint such investigators and expert witnesses as are reasonably necessary adequately to present his defense at trial and at any subsequent proceeding. Compensation for such investigators and expert witnesses shall be such amount as the court in its descretion deems reasonable and shall be paid by the county. As amended Laws 1964, Ch. 43, Sec. 3; Laws 1973, Ch. 138, Sec. 9.

STATEMENT OF THE CASE

On or about July 30, 1978, an escape occurred from the Arizona State Prison located at Florence, Arizona. The Petitioner and one Gary Tison left the prison in the company of Tison's three sons, Ricky, Raymond and Donald. A massive search immediately was mounted for the escapees and the Tison sons.

On August 6, 1978, the bodies of John Lyons, Donnella Lyons and Christopher Lyons were found in and about a Lincoln Continental automobile in the desert near Quartzite, Arizona. A girl traveling with the Lyons, a Theresa Tyson, was missing.

After the discovery of the bodies of the Lyons, massive and prejudicial publicity accompanied the search for the Petitioner and the Tisons. A special unit was formed encompassing all law enforcement agencies to investigate the case.

On August 11, 1978, the Petitioner and two of the Tison sons were captured at a roadblock near Casa Grande, Arizona. The third Tison son was killed in the incident. A highly publicized search was mounted for Gary Tison whose body was found in

the desert several days later.

Upon being captured in the early morning hours the Petitioner was detained in the desert and repeatedly questioned despite his demands for counsel. After being brought to the Pinal County Jail in Florence, Arizona, the Petitioner's initial appearance before a magistrate who was never more than 50 yards away was delayed for additional questioning.

Counsel for Petitioner filed extensive pre-trial motions directed at the pre-trial publicity, the need for experts and investigators, and the suppression of Petitioner's statements to law enforcement officers, all of which were denied or severely limited.

Petitioner was tried by a jury before the Hon. Douglas Keddie, in the Superior Court of Yuma County, Arizona. The trial was highly publicized and all persons entering the courtroom were searched for weapons each time they entered the courtroom including the jurors. Petitioner requested a stop to the searching of the jurors and moved for a mistrial. The searching continued and the motion for mistrial was denied.

Petitioner was convicted of first degree murder on a felony murder theory and was subsequently sentenced to death.

REASONS FOR GRANTING THIS PETITION

Petitioner's conviction and sentence raise serious issues concerning the validity of Arizona's death penalty as applied to persons whose crimes were committed prior to the enactment of the new statute and sentenced to death under the provisions of the judicial penalty created by Watson. Petitioner's case is unique in that it is the only one involving a crime committed after the United States District Court's decision striking down the old statute and prior to the publication of the Watson decision.

In addition the case involves a sentence of death predicated solely upon a felony murder theory.

Serious constitutional questions are also raised concerning Petitioner's ability to obtain a fair trial in this matter and as to the Arizona courts' refusal to suppress his statements.

CONCLUSION

For the reasons stated above, Petitioner requests that this Court issue a Writ of Certiorari to the Supreme Court of the State of Arizona in this case.

Respectfully submitted this the 30th day of April, 1981.

BROWN & LEDYARD

By
Robert C. Brown

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FILED
JAN 23 1981
MARYANN HOPKINS YOUNG
CLERK SUPREME COURT
BY

STATE OF ARIZONA,

Appellee,

v.

RANDY GREENAWALT,

Appellant.

No. 4616

Appeal from the Superior Court of Yuma County
Cause No. 9299
Honorable Douglas W. Keddie, Judge

JUDGMENTS AFFIRMED

Robert K. Corbin
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STRUCKMEYER, Chief Justice

APPENDIX A

This is an appeal by Randy Greenawalt from judgments of guilty to four counts of murder in the first degree, two counts of armed robbery, three counts of kidnapping, and one count of theft of a motor vehicle and from the sentences of death on the murder convictions. Affirmed.

A brief statement of the facts supporting the convictions for murder will be given at this point. Other facts necessary for an understanding of the many claimed errors will be set forth as the occasion demands.

On Sunday, July 30, 1978, appellant and Gary Tison were imprisoned in the Arizona State Prison at Florence, Arizona, serving lengthy sentences for murder. On that day, they escaped from the Arizona State Prison Trustee Annex. They were aided in their escape by Tison's three sons who were visiting the prison. Appellant actively participated in the escape, having access to the trustee annex control center and receiving and using weapons provided by Tison's sons to compel the cooperation of guards and prison visitors. Appellant and the four Tisons left the prison driving a green Ford sedan. A short time later, they transferred to a Lincoln Continental. This vehicle was later found disabled in Yuma County, Arizona, near Quartzsite.

On August 6, 1978, the bodies of John Lyons, his wife, Donnelda Lyons, and his twenty-two-month-old son, Christopher, were found in or near the Lincoln Continental automobile. Five days later, on August 11, 1978, the body of Theresa Tyson, a niece of the Lyonses, was found in a wash approximately one-fifth of a mile west of the Lincoln Continental. The remains of the Lyonses' small dog were found close to Theresa's body.

John Lyons was the owner of a late model Mazda automobile. It was subsequently found in a forested area in Coconino County near Flagstaff, Arizona, where it was partially buried and covered

with pine branches, abandoned when the Tisons and Greenawalt obtained a four-wheel drive truck in Flagstaff.

In the early morning of August 11, 1978, appellant, together with Gary Tison and his three sons, ran through a roadblock in Pinal County, Arizona. At that time they were traveling in a stolen Ford van with a Texas license. At a second roadblock, the van was forced off the road and stopped. Donald Tison, a son of Gary Tison, was found shot and unconscious in the driver's seat. Ricky and Raymond Tison, two other sons of Gary Tison, together with appellant, fled into the desert but were captured. Gary Tison escaped. His body was found several days later where he had died from exposure on the desert.

Appellant assigns twenty-three errors on appeal. It is first urged that the trial court erred in refusing to appoint an expert to conduct a public opinion survey. The purpose of the requested survey was to determine the extent to which pretrial publicity had permeated the community, thereby supplying the basis of a motion for change of venue by showing that prejudicial pretrial publicity would have the probable effect of denying appellant a fair trial.

A.R.S. § 13-1673(B) (now § 13-4013(B)) specifically provides for court-appointed experts in capital cases in this language:

> "When a person is charged with a capital offense the court * * * shall upon application of the defendant and a showing that the defendant is financially unable to pay for such services, appoint such investigators and expert witnesses as are reasonably necessary adequately to present his defense at trial * * *."

The question whether an expert can properly be appointed, pursuant to A.R.S. § 13-1673(B), to conduct a public opinion poll for the purpose of substantiating a claim that prejudicial pretrial publicity necessitates a change of venue was answered by this Court in State v. Smith, 123 Ariz. 231, 599 P.2d 187 (1979). We held:

> "Jury selection and proceedings for change of venue are not matters having a bearing on the ultimate question of defendant's guilt or innocence and, therefore, are not contemplated by the statute's requirement of necessity to present his defense at trial * * *."

The trial court correctly denied appellant's request to have an expert appointed to conduct a public opinion survey.

Appellant urges that the court erred by imposing a limitation on his use of a court-appointed investigator to areas previously presented to and approved by the court. The court ordered that an investigator be appointed from time to time, based upon counsel's in camera representations as to the necessity of investigations, and further ordered:

> "* * * if the defendants wish to have any particular area investigated, then the Court will require that in each instance, counsel advise the Court what they wish to have investigated and why it appears to them to be material." (Omnibus Hearing, September 12, 1978)

It is argued that the trial judge did not need to exercise such personal control over the investigatory activities of counsel and that such control had a "definitely chilling effect upon the conduct of the case."

In State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), this Court found that the trial court did not err in refusing to allow the court-appointed expert to conduct a questionable experiment. There we set forth the guidelines to be used by the trial court in effecting A.R.S. § 13-1673(B) as well as the scope of review of such actions on appeal:

> "A.R.S. § 13-1673(B) is not to be construed as mandating, in every case, an appointment of investigators or experts, nor the expenditure of public money for their use, merely upon application. There must be a finding, by the trial court, (1) that the defendant is unable to pay for such services himself and (2) that the appointment and expenditure is reasonably necessary to present an adequate defense. This determination * * * rests in the sound discretion of the trial court. In the absence of a showing that the determination was an abuse of that discretion, it will not be disturbed on appeal." 114 Ariz. at 540-541.

The determination of what expenditures are reasonably necessary to enable the defendant to present an adequate defense is within the sound discretion of the trial court. The requirement that counsel indicate what was to be investigated and why it was believed to be material was not only reasonable but required in order for the court to determine that the expenditure sought was reasonably necessary to enable defendant to present an adequate defense. Appellant made no showing, and our review of the record does not reveal any instance in which the court either denied such a request for an investigator or refused a requested area of investigation presented to the court pursuant to the order.

Appellant's assertion that the disparity between the State's resources and the refusal of the court to appoint an investigator without the prior approval of the court "would seem to be a clear denial of Due Process under the Fifth and Fourteenth Amendments" was also addressed and answered in State v. Knapp, supra, wherein we quoted, approved, and adopted the language of the Indiana Supreme Court:

> "* * * when the court is allocating state funds for the defense of a defendant, it is rational for the court to use discretion in granting or denying the defendant's requests * * * Within the primary goal of the judicial process, which is due process of law for each defendant, the court may determine which expenses are probably needless, wasteful or extravagant. Magley v. State, (Ind.) 335 N.E.2d 811, 816 (1975)."

We conclude the court imposed reasonable limits in order to prevent needless, wasteful or extravagant expenses. Appellant was not denied due process of law and no error was committed.

Appellant urges that the trial court erred in refusing to suppress his statements allegedly obtained by law enforcement officers in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Sixth Amendment right to counsel. The determination of this question requires an enlargement on the facts of the case.

In the very early morning hours (approximately 3:00 a.m.) of August 11, 1978, appellant and the Tisons, traveling in a late model van, ran a roadblock, fired on the officers manning the roadblock, fired on officers pursuing the van in a high-speed chase, ran through a second roadblock, ran off the highway, and, upon the vehicle becoming disabled, with the exception of Donald Tison, fled on foot into the surrounding desert. Donald Tison was found lying across the front seat of the van, unconscious from a head wound. Subsequently, aided by aerial flares and helicopter search lights, police officers found appellant and Raymond and Ricky Tison lying in the desert at varying distances from the vehicle. The three were taken into custody, disarmed, stripped, handcuffed, shackled, and placed in the bed of a pickup truck while the search continued for Gary Tison.

At daybreak, the pickup truck was moved to a more secured location and the suspects were placed in separate vehicles. Harold Cardwell, a prison official, guarded appellant in the truck. Cardwell gave appellant Miranda warnings and asked if he had any statements to make. Appellant at that time asked for an attorney. Appellant was later moved to the back seat of Cardwell's state-owned car. While in Cardwell's car, interviews were attempted by representatives from three different law enforcement agencies: Pinal County Sheriff's Office (Deputies Solis, Harwell and Martinez), Arizona State Prison officials (MacDougall, Cary and Burd), and Department of Public Safety officers (Sanchez and Greig). Two of the agencies, the Pinal County Sheriff's Office and the State Department of Public Safety, conducted interviews using a team approach. Both interviews were brief and were terminated by appellant exercising his Miranda rights. There is some indication that Deputy Solis of Pinal County continued to talk with Greenawalt

after he had asserted his rights; however, the conversation concerned whether Greenawalt had an attorney or needed to have one appointed. The interviews conducted by the prison officials, MacDougall and Burd, are somewhat confusing as to the sequence of occurrence and who was present. Both sides agree that appellant made a statement to both MacDougall (either alone or with Cary) and Burd in separate interviews. All interviewing at the scene of arrest ceased at approximately 9:25 a.m., according to Officer Sanchez' testimony.

The State, although assertedly having obtained three statements from appellant (two at the scene of arrest and one later at the Pinal County Jail), introduced and used at appellant's trial only the statement made in the Pinal County Jail. Since the two statements obtained at the scene of the arrest were not used to incriminate appellant, we need not inquire as to the use of procedural safeguards in obtaining those statements.

> "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Rhode Island v. Innis, 100 S.Ct. 1682 at 1688 (1980). (Emphasis added.)

Appellant was taken to the Pinal County Jail at about 11:15 a.m., where he was examined by a doctor and talked with an attorney for approximately fifteen minutes through a window in a cell. At no time after appellant talked with this attorney did he again request an attorney or in any way indicate a desire to have an attorney present during questioning.

Lt. Tom Brawley, of the Coconino County Sheriff's Office, acting as Supervisor of the Arizona Coordinator Investigative Team (created for the specific purpose of investigating the Greenawalt-Tison matter), interviewed appellant in his cell shortly before 2:00 p.m. It was during this interview, more than four hours after

the last interview at the scene, and after appellant had seen a doctor, a lawyer, and had rested, that he made the third incriminating statement.

The third statement was supported by the testimony on direct examination of Lt. Brawley at the trial, who testified:

"Q. After he told you that he had some things he wanted to clear up what was the next thing that occurred?

A. I then asked him what he wanted to clear up.

Q. What did he tell you at that time?

A. He told me that he wanted to clear up the news media stories of Theresa Tyson.

Q. What happened next?

A. I asked him what he meant and he replied that, 'We didn't kidnap the girl, nor was she sexually molested.'

Q. What was the next statement made?

A. I then asked him if she hadn't been kidnapped where was she.

Q. Did he respond to that question?

A. Yes, he did.

Q. What was his response?

A. His response was that she should be there with the rest of the bodies.

Q. And what was next said?

A. I told him that her body had not been found or she hadn't been found and he said, 'Well, we left her there.'

Q. Were any further statements made?

A. Yes.

Q. What was made at that time?

A. He made a statement that she has -- or I made a statement that the Yuma authorities have been unable to locate her and he replied, 'Well just look around because she has to be there.' I then asked him why did she have to be there, was she shot. And he replied, 'You goddamn right she was shot.'

Q. Was there any further conversation after that, Tom?

A. Yes.

Q. Did that concern other matters?

A. Yes, it did.

Q. How long did the conversation continue after that?

A. The total conversation was probably 20, 25 minutes.

Q. During this 20 or 25 minutes that you were there did you threaten Mr. Greenawalt in any way?

A. No.

Q. Did you make any promises to him at all?

A. No, I didn't.

Q. And did you abuse him in any way?

A. No.

Q. How would you describe your manner and your demeanor throughout this period?

A. It was as friendly as possible.

Q. During this period of time did Mr. Greenawalt have any complaints?

A. His only complaint was his eyesight and not having his glasses.

MR. IRWIN: No further questions."

There can be no question but that (1) appellant was advised of his constitutional rights pursuant to Miranda v. Arizona, supra, (2) that appellant requested counsel, and (3) that questioning by various officers from various agencies did not cease upon appellant's initial request for counsel. The issue therefore is whether appellant, after first asserting his right to counsel, subsequently waived the right.

It is well settled that a constitutional right once asserted can subsequently be waived; however, the state has a heavy burden to show such waiver once the right has been asserted. The United States Supreme Court, in North Carolina v. Butler, 441 U.S. 369,

99 S.Ct. 1755, 60 L.Ed.2d 286 (1979), held that a waiver of Miranda rights need not be explicit but may be inferred from the actions and words of a person interrogated.

> "[Quoting from Miranda v. Arizona] 'If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' 384 U.S. at 475, 86 S.Ct. at 1628."

And see Tague v. Louisiana, 444 U.S. 469, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980).

This Court has held:

> "Where a suspect has asserted his right to counsel, that right may later be waived, but establishing such a waiver requires proof of an intentional abandonment or relinquishment of a known right or privilege. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). An express refusal of counsel is not a prerequisite to a valid waiver. State v. Gholson, 112 Ariz. 545, 544 P.2d 654 (1976); State v. Jenkins, 111 Ariz. 13, 522 P.2d 1090 (1974). Thus, the answering of questions after the giving of a proper 'Miranda' warning constitutes a waiver by conduct. State ex rel. Berger v. Superior Court, 109 Ariz. 506, 513 P.2d 935 (1973), cert. denied sub nom. Pate v. Arizona, 414 U.S. 1145, 94 S.Ct. 899, 39 L.Ed.2d 101 (1974); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied sub nom. Knapp v. Arizona, 534 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978); State v. Pineda, 110 Ariz. 342, 519 P.2d 41 (1974)." State v. McGinty, 120 Ariz. 162, 164, 584 P.2d 1153 (1978); see also State v. Grange, 25 Ariz.App. 290, 543 P.2d 128 (1975).

The trial court's denial of the motion to suppress was correct. That appellant knew and understood his constitutional rights to remain silent and to have an attorney present during questioning is evidenced by his exercise of those rights. Further, appellant through intelligent exercise of his rights controlled all questioning by selectively choosing which officers with whom he would speak. (Burd, MacDougall and Brawley were all prior acquaintances.) He controlled the questioning by responding only to the specific questions he wanted to answer and refusing to respond to others. Lt. Brawley also testified in his deposition of October 31, 1978:

"Q. After this initial discussion about the subject of the body of Theresa Tyson, did you get into other or attempt to get into other areas with him?

A. Yes. I attempted to and I would ask him a question about some phase of the investigation and he said that he didn't want to reply to that and I said fine. He said, 'I told you I will talk about some things, not others.' I said, 'Fine. If I ask you something you don't want to talk about tell me.' I asked him several things he didn't want to talk about so I didn't pursue them."

In response to defense counsel's questioning, Lt. Brawley continued:

"Q. Specifically, Mr. Greenawalt would only talk to you about Theresa Tyson, is that correct?

A. He wanted to talk to me about Theresa Tyson, which he did, and then he made one comment pertaining to the Judges [other believed victims] and that was it.

Q. And you, yourself, were never told by anyone that Mr. Greenawalt had previously requested an attorney?

A. He told me, he, himself, told me that he had an attorney, but he still wanted to talk to me about certain things."

Further, Warden Burd's account also reflects that appellant exercised the same degree of control over questioning which occurred at the scene of the arrest. He testified at the suppression hearing:

"Q. And from what you said, the first question you asked him, that you remember, is where was the Tyson girl?

A. Yes, Sir.

* * * * * *

Q. Did he have any reluctance about answering that question?

A. No, to the best of my memory, he answered right off. Like we should have known, or he implied this, you know.

Q. Then, you asked -- what was the next question you asked him?

A. I asked him where Gary -- if Gary was actually in the van, you know.

Q. Did he answer that question?

A. Yes, he said he definitely was in the van and he took off with the rest of them * * *

Q. And, what was the next question you asked him?

A. And, then, I asked him about the owners of the van, where they were at.

Q. What did he say at that point?

A. He said he didn't want to answer that until he had an opportunity to talk to an attorney.

Q. What did you do at that point?

A. I left him."

Appellant argues that his waiver of his rights was not voluntary. As to this, the record is replete with testimony that appellant was never threatened and there were no promises of leniency. Appellant, himself, testified that Warden Burd "was very polite." He also testified that his reasons for choosing to speak to Warden Burd were (1) he had known him quite awhile, (2) to get rid of him, and (3) to clear up misunderstandings. At a hearing on appellant's motion to suppress, he took the stand and testified:

"Q. Mr. MacDougall and Mr. Burd. Did you answer some of their questions?

A. I believe so, yes.

Q. What was your reason for doing this, Randy?

A. Mr. Burd, I have known him for quite awhile, and, you know, he just kept asking me the questions, you know, little side line questions. I finally answered one of Mr. Burd's questions.

Q. What was your reason for doing this?

A. Oh, probably a combination of reasons.

Q. Can you express those reasons?

A. Not accurately, no.

Q. Do you know what they are?

A. Yes, one of them, one of the reasons was to try and, you know, and get rid of him, get him off my back.

Q. When you were speaking with Warden Burd, did he threaten you in any way?

A. No, he was very polite.

Q. Did he make you any promises of any sort?

A. No.

* * * * * *

Q. Without going into the actual statements you gave him, can you express the reasons that made a difference in your choosing to speak with Warden Burd?

A. To clear up misunderstandings.

Q. You felt there was some misunderstanding, then?

A. Yes.

Q. And you wished to clear up that misunderstanding?

A. In a way, yes.

Q. Did you feel at that time there had been some inaccurate reports in the newspapers?

A. Yes, sir.

Q. You felt that some of the public comments in the press and the newspapers were inaccurate and misleading?

A. Quite a bit.

Q. And, this was one of the other reasons that you thought you should explain this to Warden Burd?

A. Yes, that plus the fact that I knew him, plus he told me it wouldn't go any farther.

* * * * * *

Q. Mr. Greenawalt, I think you indicated a minute ago in my questioning that you wanted to clear something up with the Warden and this was the reason that you spoke with him, or one of the reasons that you spoke with him.

Does this have to do with accounts that had been published in newspapers or on the radio which you felt had done you some injustice?

A. I don't know about doing -- yes, that is correct. Because they were incorrect.

Q. And you wanted to clear the record, so to speak?

A. I don't know about clearing the record.

Q. Set the record straight?

A. Something to that effect."

Once the accused has properly challenged the State's evidence, the State has the burden to show, by a preponderance of the evidence, the legality of the acquisition of any challenged evidence. The court's findings, pursuant to a Rule 16.2, Rules of Criminal Procedure, 17 A.R.S., motion to suppress, as to the lawfulness of the State's acquisition of evidence will be upheld on appeal if supported by adequate evidence absent clear and manifest error.

By stipulation of counsel, appellant's motion to suppress was heard and decided by a Pinal County Superior Court Judge rather than the Yuma County judge assigned to the case.

The evidence presented, viewed most favorably to affirming the trial court, indicates: (1) appellant received, understood and asserted his constitutional rights; (2) that when appellant chose to speak, he did so only to those officers with whom he was previously acquainted; (3) and even then, was very selective as to what questions he would answer, thereby maintaining complete control of the interview; and (4) that the purpose or reason for discussing any area with any officer was appellant's desire to correct the inaccurate and misleading news reports relative to the Yuma County incident and specifically the whereabouts of one of the victims, Theresa Tyson; (5) that no promises, threats or coercion were used to obtain the statements; (6) that although appellant was successively interviewed, the interviews were conducted by investigators from different agencies, each conducting its own investigation, and were of very brief duration; and (7) when appellant indicated to the interviewer that he did not want to discuss the matter further, or that he wanted an attorney present,

questioning by that interviewer ceased and his assertion of rights was respected and honored by that interviewer.

The trial court, following the hearing at which appellant testified as stated supra, found:

> "* * * the statements made by Randy Greenawalt on August 11, 1978 to law enforcement personnel, both at the scene of the arrest and at the Pinal County Jail, were made freely and voluntarily, therefore the Motion to Suppress is denied."

We hold the trial court did not err in this respect.

For his fourth assignment of error, appellant urges that the trial court erred in refusing to grant his pretrial publicity motions. Specifically, he points to (1) his motion to continue, (2) his request to individually voir dire jurors, (3) his motion to have the jury sequestered, and (4) his motion to change either the venue or the venire.

We note that the determination of these, like most pretrial motions, rests within the sound discretion of the trial court, and as such will not be disturbed on appeal absent a clear showing of abuse of discretion and resulting prejudice to defendant.

> "A motion for continuance is not granted as a matter of right. The matter is solely within the sound discretion of the trial judge whose decision will not be disturbed unless there is a clear abuse of discretion, and unless denial of the motion is shown to be prejudicial to the defendant. State v. Richie, 110 Ariz. 590, 521 P.2d 1136 (1974); State v. Benge, 110 Ariz. 473, 520 P.2d 843 (1974); State v. Guthrie, 108 Ariz. 280, 496 P.2d 580 (1972)." State v. Jackson, 112 Ariz. 149, 154, 539 P.2d 906 (1975).

See also, State v. Schmid, 107 Ariz. 191, 484 P.2d 187 (1971).

Appellant's other motions are governed by the same standard; for abuse of discretion with resulting prejudice, see State v. Schmid, supra (change of venue); State v. Richmond, 112 Ariz. 228, 540 P.2d 700 (1975)(change of venue); State v. Melendez, 121 Ariz. 1, 588 P.2d 294 (1978)(scope of voir dire); State v. Rose, 121 Ariz. 131, 589 P.2d 5 (1978)(extent of voir dire); Rule 18.5, Arizona Rules of Criminal Procedure, 17 A.R.S. ("the court <u>may</u> permit counsel to examine an individual juror" (emphasis added)); State v.

Lippard, 26 Ariz.App. 417, 549 P.2d 197 (1976); Rule 19.4, Rules of Criminal Procedure, 17 A.R.S. ("The court in its discretion may permit jurors to separate or, on motion of any party, may require them to be sequestered * * *" (emphasis added)).

With this standard in mind, we examine each specifically asserted error for abuse of discretion.

Appellant contends that "[t]he court did not permit the matter to be continued sufficiently to allow the publicity to subside, and granted continuances only long enough to permit counsel to prepare for trial." There can be no question but that during August and September of 1978 the crimes with which appellant was charged, as well as his subsequent capture by law enforcement officers, were top news items which received extensive coverage. Appellant's trial, which resulted in his conviction began February 9, 1979, almost six months after his capture. The record not only does not indicate that the extensive news coverage continued throughout the six-month period between appellant's capture and his trial, but appellant's counsel affirmatively asserted on November 14, 1978 that the publicity had died down to manageable proportions and that the case was becoming a "murder case and not a cause celebre." On this record, there is no evidence that the trial court abused its discretion.

Appellant asserts that "[t]he court did not permit individual voir dire of the jurors in order to allow counsel to probe for the effects of the publicity." Contrary to what appellant asserts, the trial judge did permit counsel to question several jurors individually, out of the hearing of other jurors, following the court's voir dire. Defense counsel questioned thirteen jurors individually and separately regarding the publicity generally and specifically on what they knew or could recall about statements allegedly made by the Tison brothers.

Rule 18.5, Arizona Rules of Criminal Procedure, 17 A.R.S., governs the procedures for selecting a jury. It provides:

> "d. Voir Dire Examination. The court shall conduct the voir dire examination, putting to the jurors all appropriate questions requested by counsel. The court may in its discretion examine one or more jurors apart from the other jurors.
>
> If good cause appears, the court may permit counsel to examine an individual juror.
>
> e. Scope of Examination. The examination of prospective jurors shall be limited to inquiries directed to bases for challenge for cause or to information to enable the parties to exercise intelligently their peremptory challenges." (Emphasis added.)

The rule clearly puts the burden of voir dire on the court; however, for good cause appearing, the court may permit, in its discretion, counsel to examine an individual juror. The trial judge examined the panel from questions prepared by counsel, permitted individual voir dire by respective counsel as appropriate due to the affirmative answers, and, further, permitted defense counsel to individually question some thirteen jurors separate and apart from all other jurors.

In reviewing the questions posed to the panel by the trial judge, we find that all areas of pretrial publicity, prior knowledge of the appellant's background, and the alleged statements of the Tison brothers were sufficiently inquired into to give counsel adequate information to enable them to intelligently exercise their challenges. We find no error in refusing to allow defense counsel to individually and separately question every member of the panel.

Appellant complains of the failure to sequester the jury. Rule 19.4, Arizona Rules of Criminal Procedure, provides:

> "The court in its discretion may permit jurors to separate or, on motion of any party may require them to be sequestered * * *."

He argues it was error for the trial court to refuse to sequester the jury and to allow them to return to the community "saturated" with trial publicity every night. The trial court admonished the jurors:

> "Do not expose yourselves to any news accounts of the trial and don't go to anyplace mentioned in the evidence for the purpose of making a personal inspection of it. Regarding news accounts of the trial I am sure there will be some. Tell your family you are not to be exposed to any of those accounts. Don't read any newspaper accounts and tell them not to permit you to read any news accounts. If necessary, have them cut those accounts out of the paper if you want to read the paper.
>
> So far as television sets are concerned just don't be in the room when the news is on. Don't listen to it, don't turn on the radio for that purpose. And if you find yourself in that position you can either turn it off or get out of the room. Let your family know these are the ground rules by which you must abide during the course of the trial."

We think this is sufficient, absent a showing of juror misconduct or disobedience to the court's admonitions. We will not disturb the trial court's discretion in this matter on appeal.

Appellant complains that he was denied a change of venue based on pretrial publicity. His burden is set forth in Rule 10.3(b), Arizona Rules of Criminal Procedure, 17 A.R.S.:

> "Whenever the grounds for change of place of trial are based on pretrial publicity, the moving party shall be required to prove that the dissemination of the prejudicial material will probably result in the party being deprived of a fair trial."

Appellant has filed numerous newspaper articles relative to the prison escape, the discovery of the victims' bodies, the shootout capture at the roadblock, and the ensuing judicial proceedings. Such events are clearly newsworthy and will almost always generate extensive coverage due to the very nature of the activities. However, it is the "prejudice" of the publicity, and not the "extensiveness" of the publicity, with which we are concerned. In State v. Schmid, 109 Ariz. 349, 353, 509 P.2d 619 (1973), this court clearly placed the burden of proving publicity-

caused jury prejudice on the defendant:

> "We hold that without a showing of such outrageous circumstances as Sheppard [384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)] or Estes [381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), reh. den. 382 U.S. 875, 86 S.Ct. 18, 15 L.Ed.2d 118 (1965)], where an accused is subjected to widespread publicity prior to and during the trial, it is not enough to allege that there was extensive press coverage of the trial or the events preceding it, unless jury prejudice can be proved."

An examination of the jurors, through voir dire process, is an effective means by which to determine the effects or influence of pretrial publicity on the jurors. As discussed previously, voir dire in this case was extensive with a particular emphasis on inquiry into the exposure to and effects of pretrial publicity.

A defendant, pursuant to fundamental fairness, due process requirements of the federal and state constitutions, is entitled to be tried by a fair and impartial jury. U. S. Constitution, Fifth and Fourteenth Amendments; Art. II, Sec. 4, Arizona Constitution; Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Therefore, our inquiry is whether the publicity, extensive or otherwise, was prejudicial to the point of having the probable effect of precluding a trial by fair and impartial jurors. Rule 10.3(b), Rules of Criminal Procedure, 17 A.R.S.

> "The fact that all of the empanelled jurors had some degree of knowledge of the facts of this case, does not, in and of itself, demonstrate such prejudice as would necessitate a change of venue * * *." State v. Schmid, 107 Ariz. 191, 193, 484 P.2d 187 (1971).

This case, like Schmid, supra, is one in which the entire panel had, through pretrial publicity, acquired some degree of knowledge of the facts of the case; but, as the record shows, only 41 potential jurors had to be called to obtain a panel of 34 (20 challenges, 2 alternates, and jury of 12),of which only four

were excused by the court for the reason that they could not set aside a previously formed opinion. Additiona indicia of lack of juror prejudice is indicated by the fact that in the jury selection process for the initial trial (which terminated in a mistrial) only 39 had to be called to qualify a panel of 34.

Finally, we note what the trial judge said in denying the defense motion to have a public opinion poll taken:

> "I think the best way to determine the existence of whether your case can be fairly tried here would be through a voir dire process and failing that, then, of course, the question that you seek can be raised once again.
>
> The newspaper accounts to this point, the factual reporting, that is, has not struck me, and those accounts which I read in both the local newspaper and the Arizona Republic as being anything but a factual rendition; albeit, inaccurate. We may find that out later, but I don't think the articles that I have read have been designed to inflame the passions of the public * * *."

Appellant has failed to carry his burden of showing that the extensive pretrial publicity was prejudicial or would probably result in the denial of a fair trial. The trial court denied the motion for change of venue and we will not disturb his ruling on the present record.

Appellant asserts he did not receive the type of fair trial mandated by the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution due to the publicity in this matter. He points to what he calls the "unchecked and irresponsible journalism" which created the type of carnival-like atmosphere which the court found present and condemned in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In addition, counsel relies on pretrial publicity matters which this Court has previously held should not occur, and which may result in reversal. Specifically, this Court in State v. Schmid, supra, suggested that in order to preserve the rights of the accused, the news media restrict its coverage in several

particulars, including:

> "(1) the character, reputation, or prior criminal record (including arrests, indictment, or other criminal charges) of the accused;
>
> * * * * * *
>
> (3) the existence or contents of any confession, admission, or statement given by the accused, * * *
>
> * * * * * *
>
> (5) the identity, testimony or credibility of prospective witnesses; * * *." 109 Ariz. at 353-354.

The clear concern of the court in Schmid was the effects of such publicity upon the accused's right to be tried by a fair and impartial jury. Although publicity of the nature specified in Schmid may create such prejudice as would preclude a fair trial, this will not be presumed unless the circumstances are extreme.

Prejudice, sufficient to preclude a fair trial, has been presumed from the outrageous circumstances in which the trials were conducted in Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Sheppard v. Maxwell, supra. In Murphy v. Florida, supra, the Court explained that in these cases, Rideau, Estes, Sheppard, the presumption of prejudice was based on the fact that:

> "The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. [These cases] cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." 421 U.S. at 799, 95 S.Ct. at 2036, 44 L.Ed.2d at 594.

The proceedings involved in the three cases wherein prejudice was presumed lacked the solemnity and sobriety appropriate to a judicial proceeding, and, instead there developed a carnival-like atmosphere. Such was not present in the case before us. The trial was covered by the press, including the use of television cameras on the lawn of the courthouse. They were prohibited inside. Persons attending the trial, including jurors, were searched and the jury was not sequestered. But we do not think this even remotely approaches the outrageous circumstances present in those cases in which prejudice has been presumed. Since we do not find a presumption of prejudice, appellant must show the actual presence of such prejudice that a fair trial was precluded.

Appellant relies heavily on the extensive pretrial publicity to establish such prejudice. It is pointed out that the media printed the prior criminal record of appellant "ad nauseum," and published the alleged confessions of codefendants accusing appellant of the murders, thereby completely ignoring the Schmid criteria. While the Schmid criteria are clearly an indication of the factors this Court may look to to determine whether the publicity has prejudiced the accused's right to a fair trial, they are not ironclad grounds for automatic error.

The court on voir dire placed particular emphasis on the two noted areas of publicity.

> "THE COURT: Very well. Do you know anything of or have you read or heard anything about the life and history of Randy Greenawalt, the defendant, as it existed before July 1978? * * *"

There were no affirmative responses to this inquiry. As to the alleged statements made by the codefendants, the court, early in voir dire asked:

> "All of you have heard or read about the case. More specifically have any of you, do any of you recall having heard or read anything about statements attributed to the defendant or co-defendants, Ricky Tison or Raymond Tison? Do any of you recall having heard anything about the statements they may have made?"

To which fifteen members of the panel responded affirmatively. Subsequently, close to the end of the voir dire, the court again asked:

> "Finally, let me ask again, I think I asked this question previously, but I may have overlooked doing so, have any of you read or heard about any statement attributed to either the defendant or to co-defendants Ricky and Raymond Tison concerning this case?"

At this time, ten members of the panel responded affirmatively.

It should be noted that between the first inquiry and the second, four jurors ahd been excused by the court and four new panelists called. Of the 19 individuals acknowledging having heard or read about the statements, four were excused by the court for having a strong opinion, and 13 were individually and separately questioned on voir dire by defense counsel. Of 13 individually examined, defense counsel allowed three to remain on the panel without being peremptorily challenged. Although defense counsel did challenge one for cause, upon denial of the challenge counsel did not peremptorily challenge the particular juror. The jury which convicted appellant contained five members who acknowledged prior knowledge, three of whom had been individually examined on voir dire, and all of whom the court decided could set aside what information they remembered and decide the case fairly and impartially.

We do not think that on this record there was a sufficient showing that the prior publicity, both as to the statements allegedly made by the codefendant and the prior criminal record of the defendant, tainted the jury's verdict. The language of the United States Supreme Court in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), is appropriate here:

> "Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under Murphy, extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.' Murphy v. Florida, supra, * * *." 432 U.S. at 303, 97 S.Ct. at 2303, 53 L.Ed.2d at 362. (Emphasis added.)

In reviewing the entire record, we are satisfied that the trial judge, with the cooperation of the parties and members of the press, conducted this trial in a fair and impartial manner. The proceedings were conducted in appropriately solemn and serious judicial fashion, accompanied by a full and sober realization of all that was involved. We find no violation of the Arizona Constitution, nor of the federal constitutional requirements of due process.

For his sixth error on appeal, appellant argues the trial court erred in refusing to grant his motion in limine and the overruling of his objections at trial regarding the exclusion of evidence of events occuring before and after the killing of the Lyons family and Theresa Tyson. Specifically, appellant objects to the testimony relative to the prison escape and to his capture near Casa Grande as being irrelevant and highly prejudicial. He urges that the applicable rule regarding admissibility of separate and distinct crimes is stated in State v. Dorsey, 25 Ariz. 139, 143, 213 P. 1011, 1012 (1923):

> "The general rule is that, in the prosecution of one accused of a particular offense, evidence showing or tending to show the commission by accused of another crime entirely distinct and independent of that for which he is on trial, * * * is neither relevant nor admissible."

While we agree with the statement of the rule, see also State v. Myers, 117 Ariz. 79, 570 P.2d 1252 (1977), cert. denied 435 U.S. 928 (1978), we fail to find it applicable to the present case for the following reasons. Appellant was charged with murder in the first degree pursuant to A.R.S. § 13-452 (now § 13-1105), which at the time of the offense read:

> "A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody * * * is murder in the first degree." (Emphasis added.)

In the present situation we are not dealing with "another crime entirely distinct and independent of that for which [the accused] is on trial" as contemplated in Dorsey, or Rule 404(b), Rules of Evidence, 17A A.R.S. To convict under the statute A.R.S. § 13-454 (now § 13-703), the State must present evidence sufficient to show that the murders were committed in "avoiding or preventing lawful arrest or effecting an escape from legal custody," or any of the other proscribed acts. Where the accused is charged with first degree murder, based upon the felony-murder statute, which itself requires a showing of another underlying crime or specified conduct as an element of the offense charged, evidence of the proscribed conduct cannot be precluded as being irrelevant or prejudicial. Clearly, in such situations the underlying criminal activity is not distinct and independent; rather, it is an integral part of the crime with which appellant was charged. Testimony regarding appellant escape and flight from the Arizona State Prison, as well as testimony regarding the capture is relevant and admissible to show either that the murders occurred in "effecting an escape", "to avoid or prevent lawful arrest", or both.

Appellant and his companions fled the prison in a green Ford sedan and within a very short time changed to a Lincoln Continental. This vehicle, after being driven some distance, became disabled. It was discarded and abandoned in the desert in Yuma County. Appellant and his companions continued their journey in the late model Mazda registered in the name of the victims, the Lyons family, and it was driven until yet a fourth vehicle was obtained in northern Arizona. Several days later, while in still another vehicle, the group ran the roadblock in Pinal County. In all, they traveled in at least five different vehicles.

The Continental and the Mazda were abandoned in such a manner as to suggest there was an attempt to keep their locations secret, so that the occupants' route and whereabouts would be unknown to the authorities seeking their capture. The Continental was driven some distance off the highway onto a gasline maintenance road and then backed well off the gravel maintenance road into the desert. The vehicle and the remains of the murdered victims were not discovered until August 6, 1978, almost six full days after the murders occurred. The Mazda was driven until a Chevrolet truck was obtained, and it was then abandoned in a forest area south of Flagstaff. The Mazda was discovered by authorities on August 11, 1978, some eight days after appellant and his companions were last seen in the area. It had been painted gray with spray paint, buried to the center of the wheels, and covered with pine boughs.

Testimony of the capture indicated that the vehicle in which appellant was riding ran two roadblocks and the occupants of the van fired on the law enforcement officers manning the roadblocks. Officers on the scene testified that when appellant was taken into custody, he was armed with a rifle and a .357 magnum pistol.

Evidence of the prison escape, repeated changes of vehicles, the means of disposing of the vehicles used, and the circumstances of the apprehension near Casa Grande, including the weapons seized, is relevant and admissible to establish a substantive element of the crime with which appellant is charged -- that appellant was effecting an escape from lawful custody and/or was attempting to avoid or prevent lawful arrest. The trial court did not err in admitting evidence of the very acts or circumstances which the applicable statute, A.R.S. § 13-452, specifically itemized as elements of the charge itself. We think the evidence objected to was obviously relevant.

For his seventh issue on appeal, appellant argues that the trial court erred in denying his challenge to the jury panel on the grounds that (1) the size of the panel from which the jury was drawn was somewhat reduced in that four juries had been drawn from the panel within four days, and (2) that the average age of prospective jurors was "raised" to 45.5 years.

We do not understand that this could possibly be error. An accused has a constitutional right to be tried by a fair and impartial jury, United States Constitution, Amend. VI; Arizona Constitution, Art. 2, §24, but he is not entitled to be tried by any one particular jury. See State v. Thompson, 68 Ariz. 386, 206 P.2d 1037 (1949). Unless the record affirmatively shows that a fair and impartial jury was not secured, the trial court must be affirmed. State v. Zimmer, 106 Ariz. 166, 472 P.2d 35 (1970).

In challenging the jury panel, pursuant to Rule 18.4, Rules of Criminal Procedure, 17 A.R.S., the challenger has the burden of showing that the panel's selection constituted or was the result of a "material departure from the requirements of law." Appellant has not shown that the jury was unlawfully empanelled (as required by Rule 18.4) or that the jurors were other than fair and impartial (as required by the Arizona and United States Constitutions).

Appellant alleges that the average age of prospective jurors was "raised" to 45.5 years, but he makes no showing of the average age of all potential jurors or, if a substantial deviation was present, how such a deviation prejudiced him. Unless it can be shown that the average age of the jurors was prejudicial to him, appellant's challenge based on the age of the jurors is without merit. Nor does the fact that the master panel from which appellant's jury was selected had been reduced in number in itself give rise to reversible error without a showing of prejudice. Rule 18.4, Rules of Criminal Procedure, 17 A.R.S. We find this Court's

statement in State v. Miller, 71 Ariz. 140, 224 P.2d 205 (1950), determinative of appellant's position on appeal:

> "* * * When a jury panel has been regularly called, summoned, qualified and sworn, in accordance with [the applicable laws] * * * then such a panel is a legal jury panel. The mere fact that the whole jury panel of 175 members, as there were in this one, is not again personally summoned through the sheriff and present when a case goes to trial is not such an irregularity that would disqualify a fair representative group drawn by lot from the panel to try the case. All that a defendant or party litigant is entitled to is a fair and impartial jury to try his case. In the instant case no claim is made by defendant that he was prejudiced in any way. He is merely insisting on an assumed technical legal right to have the entire panel present. We feel the record shows that his rights to a fair and impartial jury have not been invaded and that is all that is due him." 71 Ariz. at 143. (Emphasis added.)

Appellant was tried by a fair and impartial jury, drawn from a legally constituted panel. We find no error.

Appellant urges as his eighth error on appeal that the trial court erred in refusing to halt the sheriff's "searching" of jurors and spectators and in denying his motion for mistrial based upon such searches. The "searching" of which appellant complains was the subjecting of spectators and, on occasion jurors, to a minimally intrusive "scanning" by an electronic metal detecting device.

The issue of whether a defendant had been denied a fair trial by reason of the security precautions employed throughout the trial has been addressed by the Federal Circuit Court in United States v. Howell, 514 F.2d 710 (5th Cir. 1975), cert. denied 429 U.S. 838 (1976). There, the court held that the presence of eleven marshals in the courtroom and the practice of passing all persons, including jurors, admitted to the courtroom through two magnometers for the purpose of detecting metal was not unreasonable given the facts known to the court. See also United States v. Kelly, 551 F.2d 760, cert. denied 433 U.S. 912 (8th Cir. 1977); United States v. Jackson, 549 F.2d 517 (8th Cir. 1977). Here, the

very nature of the crimes with which the defendant was on trial and the knowledge that at the time of the crimes he was an escapee from the state prison where he had been incarcerated for a prior murder, clearly justified the trial judge's concern for the safety of those present in the courtroom.

The conduct of a trial to a very large extent rests within the sound discretion of the trial judge, who is in the best position to observe what measures need to be taken to insure that there be a fair and impartial trial. Counsel's analogy to the "restraint" cases is ill-founded. The concern here was not entirely with the possibility of appellant's escape or his dangerous nature, but also with the possibility that appellant would be protected against violent reprisals by those who might attempt to administer their own concept of justice. In view of the facts and circumstances known to the trial judge, we find no abuse of discretion.

Next, appellant argues that the trial court erred in admitting into evidence the numerous weapons which were found in the van in which appellant was riding when captured. These weapons, according to appellant, bore no known connection with the Yuma County charges for which the accused was on trial.

We disagree. That at the time of his arrest appellant had in his possession and had access to many deadly weapons, clearly substantiates the State's theory that the five people in the van were attempting to avoid being arrested or captured and showed that they were prepared and capable of using the most extreme measures to prevent their future restraint. Evidence is not inadmissible simply because it paints a black picture of a defendant's character or his bent for evil. We find no error.

Appellant next urges that the trial court erred in refusing to give his requested second degree murder instruction. The Court's

reason for refusing the requested instruction was stated as:

> "Defendant's requested instruction number 12 is refused in that it instructs on second degree murder and the case is being submitted solely on the felony murder rule."

In State v. Valenci 121 Ariz. 191, 589 P.2d 434 (1979), this Court considered the propriety of instructing on second degree murder when an accused was charged under the felony-murder statute. In that case, the defendant was charged with first degree murder committed in the perpetration of a robbery. After noting that the trial court should instruct the jury on every degree or grade of offense that is supported by the evidence, we said:

> "We have stated that a jury may not be instructed on a lesser degree of murder than first degree where the evidence indicates it was committed in the course of a robbery. State v. Clayton, 109 Ariz. 487, 514 P.2d 720 (1973); State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966); State v. Folk, 78 Ariz. 204, 277 P.2d 1016 (1954)." 121 Ariz. at 198.

When a case is submitted to the jury solely on a felony-murder theory, the jury may not be instructed on a lesser degree of murder where the evidence indicates it was committed in the perpetration or attempted perpetration of any of the activities enumerated in the first degree murder statute, A.R.S. § 13-452.

The evidence in the present case supports only a first degree murder instruction because the murders were committed either in effecting an escape from lawful custody, in preventing or avoiding lawful arrest, or in a robbery while effecting an escape or avoiding an arrest. The trial court properly refused the requested instruction.

Appellant's eleventh assignment of error is that the court below erroneously instructed the jury at the State's request on the theory of conspiracy as a groundof vicarious criminal responsibility.

The Court instructed the jury:

"A conspiracy is an agreement between two or more persons to commit a public offense or crime.

It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all the circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the facts or by circumstantial evidence.

The acts and statements of a conspirator when said or done in furtherance of the conspiracy and during its continuance are binding on all participants in the conspiracy.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand a person who has knowledge of a conspiracy, but happens to act in a way which furthers the object or purpose of the conspiracy does not thereby become a conspirator.

Before you may find a defendant or any other person has become a member of a conspiracy the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate wilfully means to act or to participate voluntarily and intentionally and with specific intent to do something that the law forbids or with specific intent to fail to do something the law requires to be done. That is to say, to act or participate with the bad purpose either to disobey or disregard the law.

So if a defendant or any other person with the understanding of the unlawful character of a plan knowingly encourages, advises, or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant conspirator.

One who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the original conspirators or instigators of the conspiracy."

By statute:

"All persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed." A.R.S. § 13-139 (now § 13-301).

Clearly under the State's evidence in the case by force of A.R.S. § 13-139 Greenawalt was concerned in the commission of the crimes and was therefore a principal in the murders of Theresa Tyson and the Lyons family. The evidence showed that Greenawalt just before the escape was in the trustee annex control center at the Arizona State Prison, where he received a shotgun and a pistol from one of Gary Tison's sons; that he gave the pistol to Gary Tison when Gary entered the control center and used the shotgun to threaten the prison guards, compelling them to lie down on the floor. Thereafter, Greenawalt locked the guards and some prison visitors in a storage room and left the prison with Gary Tison and his sons in a green Ford sedan, later found abandoned two miles from the prison. They transferred to a Lincoln Continental which had been given to Gary Tison's sons by an uncle. When the Lincoln was found, appellant's palm print along with finger prints of each of the Tisons were found on it.

A friend of Greenawalt, Kathleen Ehrmentraut, was contacted by Donald Tison on the afternoon of the day following the Lyons murders. She later met Greenawalt at her home about 9:00 p.m. and there was a discussion about their use of her son's truck. The next morning, Greenawalt returned with Donald Tison and told Ehrmentraut to go to town and buy them a vehicle, which she and Donald Tison did, buying a blue, four-wheel-drive Chevrolet pickup. She left appellant at the house to watch her grandchildren. In addition, Ehrmentraut gave Tison and Greenawalt a Winchester rifle and a .357 magnum pistol. That afternoon she bought more than $80.00 worth of ammunition which she gave to appellant later that evening. The Lyonses' Mazda was subsequently found in the same general area where she gave the ammunition to Greenawalt. His fingerprints along with those of Raymond Tison were found in the Mazda. A person resembling appellant in appearance was later seen

in Flagstaff putting gas in the blue Chevrolet pickup. When appellant was captured, he was armed with the pistol and the rifle which had been obtained from Ehrmentraut.

Appellant's statement made to Officer Tom Brawley, as testified to by Brawley, is alone sufficient evidence to tie Greenawalt to the homicides. Greenawalt told him: "We didn't kidnap the girl [the Lyonses' niece], nor was she sexually molested. * * * we left her there * * * just look around because she has to be there * * * she was shot."

The conspiracy instruction charged the jury that:

> "So if a defendant or any other person with the understanding of the unlawful character of a plan knowingly encourages, advises, or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant conspirator."

This is no more than a re-statement of the criminal responsibility found in A.R.S. § 13-139, that is, if appellant encouraged, advised, or assisted the Tisons "for the purpose of furthering the undertaking" he became a "participant conspirator." While the requested instruction involving conspiracy added nothing to the State's theory of responsibility for the murders, under the felony murder statute, A.R.S. § 13-452, neither do we think it misled or confused the jury.

For his twelfth error, appellant urges that the court below erred in refusing to conduct separate hearings for sentencing for capital and non-capital crimes, and, as a result, evidence which was inadmissible under the death penalty statute was considered by the court. We, however, disagree. No error was committed in holding either a single sentencing hearing or in admitting the evidence objected to by appellant.

The Arizona death penalty statute provides for a "separate sentencing hearing," A.R.S. § 13-454(A) (now § 13-703(B)), at which time evidence may be offered by both sides in order to support or

controvert the existence of aggravating and/or mitigating circumstances. A.R.S. § 13-454(B) (now § 13-703(C)). The appellant's position is that this statutory provision requires separate hearings on sentencing to be held when there are convictions for capital and non-capital crimes. We hold, however, that the intent of the Legislature in enacting the statute requiring "separate sentencing hearing" was merely to provide for a bifurcated procedure by which sentencing was to be separated from the trial of guilt and that the words have no further purpose.

The appellant next challenges the nature of the evidence which was received in the aggravation/mitigation hearing. The prosecution introduced certified copies of the prior convictions of the appellant from both Arizona and Arkansas which established that Greenawalt had been convicted of first degree murder in both jurisdictions, and of robbery in Arkansas. Further, law enforcement officers were permitted to testify as to the specific factual circumstances of the crimes. Sheriff George Ford of Mississippi County, Arkansas, testified concerning a conversation he had with Greenawalt regarding the manner in which the robbery and killing in Arkansas were committed. According to Sheriff Ford, Greenawalt told him that he had stopped at a rest stop along the highway and, being that he was "* * * broke and needed some money," he had armed himself and decided to rob a truckdriver who had gone into the restroom. Greenawalt went into the restroom and "* * * engaged briefly in a conversation with the decedent * * *. And * * * he went to the stall where Mr. Weber was seated on the commode and demanded that he give him money. * * * And as he stood up he told me he shot him in the head."

The prosecution also had photographs of the scene of the killing in Arizona admitted in evidence. And, finally, Lt. Brawley of the Coconino County Sheriff's Office testified concerning

statements made by Greenawalt in regard to the actual commission of the Arizona crime. According to this officer's account, Greenawalt stated that "* * * he had learned of a good way of obtaining money from truckdrivers," and had then shot and robbed a truckdriver while the victim was asleep in his truck.

Appellant interprets our decision in State v. Lee, 114 Ariz. 101, 559 P.2d 657 (1976), as precluding the sentencing court from receiving any evidence other than certified copies of prior convictions. Appellant errs in his interpretation of our decision in State v. Lee, supra. There, we were concerned with the introduction of evidence of prior convictions as they related to the first aggravating circumstance, A.R.S. § 13-454(E)(1) (now § 13-703(F)(1)). We did not hold that other forms of evidence were not relevant and admissible to the other aggravating circumstances specified in the statute. To illustrate, in State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied 433 U.S. 915, 97 S.Ct 2988, 53 L.Ed.2d 1101 (1977), we approved of the procedure in which the victim in a different crime was called as a witness to identify the defendant as the person who had kidnapped him. This form of evidence was offered and received by the sentencing court to establish the existence of the second aggravating circumstance under our death penalty statute, a prior felony conviction involving the use or threat of violence on another person. A.R.S. § 13-454(E)(2) (now § 13-703(F)(2)). The limitation on proof which was adopted in State v. Lee, supra, has no application to the second aggravating circumstance. The testimony of the three law enforcement officers concerning the details of the prior crimes of violence which were committed by Greenawalt was properly received in the court below.

Appellant questions whether the admission of the testimony of the nature of the prior crimes at the sentencing hearing

violates the statutory limitation on the receipt of evidence found in A.R.S. § 13-454(B). That section provides:

> "* * * the admissibility of information relevant to any of the aggravating circumstances * * * shall be governed by the rules governing the admission of evidence at criminal trials."

It is the appellant's view that this evidence was highly prejudicial and irrelevant and, as such, would not have been admissible at a trial.

By Rule 403, Rules of Evidence, 17A A.R.S., relevant evidence will be excluded only if its probative value is substantially outweighed by factors such as the danger of unfair prejudice. Since the testimony of the law enforcement officers about the prior crimes was highly relevant to the determination by the court of whether a crime of violence within the purview of A.R.S. § 13-454 (E)(2) had occurred, we hold that the admission of this evidence was proper. The receipt of this testimony serves the basic function of an aggravation/mitigation hearing which is to determine the character and propensities of the defendant so that the punishment imposed will fit both the crime and the offender. State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979). Moreover, it leads to the inference appellant did not have such scruples that his conduct was such he played only a minor part in the homicides.

Appellant next contends that the additional aggravating circumstances found in the sentencing hearing were not established in accordance with our decision in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924, 99 S.Ct.1254, 59 L.Ed.2d 478 (1979).

The court below found the existence of A.R.S. § 13-454(E)(1) and (2), providing as follows:

"1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person."

The record reflects that the evidence presented supports the finding of these aggravating circumstances. The certified copies of the first degree murder convictions of Greenawalt support the finding of A.R.S. § 13-454(E)(1) because those crimes are punishable by life imprisonment or death in Arizona. A.R.S. § 13-454; see State v. Steelman, ____ Ariz. ____, 612 P.2d 475 (1980); State v. Smith, 125 Ariz. 412, 610 P.2d 46 (1980). The testimony of Sheriff Ford shows beyond question that Greenawalt had been convicted of a felony in the United States involving the use or threat of violence on another person. A.R.S. § 13-454(E)(2); see State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924 (1979).

Since the first two aggravating circumstances were properly established and since mitigating circumstances were not established, it is unnecessary to further consider other findings made by the sentencing court as aggravating circumstances enumerated in A.R.S. § 13-454(E)(3), (5) and (6) (now A.R.S. § 13-703(F)(3), (5) and (6)). See State v. Jordan, ____ Ariz. ____, 614 P.2d 825 (1980).

Appellant next asserts that the sentencing court erred in its determination as to the existence of the mitigating circumstances enumerated in A.R.S. § 13-454(F)(1) through (4) (now § 13-703(G)(1) through (5)).

The first mitigating circumstance enumerated in the statute reads:

"1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."

Appellant's position is that this mitigating circumstance was established through the testimony of Dr. Richard Melendez, a psychiatrist who diagnosed Greenawalt as a borderline organized personality structure, which he characterized as an individual with an "* * * apparent ability to function at relatively high levels of productivity in a conventional sense while at the same time episodically, transiently and under particular circumstances experience breaks with reality comparable to those that are found in the full blown psychotic illness, such as schizophrenia." Dr. Melendez described this kind of person as one who lacks self-identity and when placed around an authoritative figure becomes submissive to the point of blindly following the will of that person. It was his opinion that Gary Tison could have been such a dominant personality in Greenawalt's life at the state prison and that the severe dependence and relinquishment of autonomy which takes place could have been present at the time of the prison escape and sequential events. In his professional medical opinion, it severely disabled appellant's judgment and his ability to perceive reality.

However, Dr. Michael Cleary, called by the prosecution, reached an entirely different conclusion. He criticized the theory relied upon by Dr. Melendez and felt that Greenawalt had not exhibited the extreme signs of dependence usually associated with a borderline organized personality especially because of the independent roles he played in the previous killings of which he had been convicted. Dr. Clearly could find no signs of psychotic behavior necessary for a diagnosis as a borderline organized personality; hence, in his opinion Greenawalt did not suffer from any mental disease or defect which constituted impaired capacity.

In evaluating the merits of the findings of the sentencing court with regard to the existence of the mitigating circumstances,

our review of the record has revealed no basis which justifies disturbing the determination of the trial court. The burden of establishing mitigating circumstances rests with the defendant. A.R.S. § 13-454(B); State v. Smith, supra; State v. Watson, supra. In this matter the lower court was not compelled to accept Dr. Melendez' psychiatric opinion of the mental condition of Greenawalt in the light of the unproven nature of the theory relied upon by Dr. Melendez for his diagnosis and the unsatisfactory explanation of certain events in Greenawalt's life which, in combination, did not adequately substantiate his claim of impaired capacity within the contemplation of A.R.S. § 13-454(F)(1). See generally State v. Richmond, supra; State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979); State v. Evans, 124 Ariz. 526, 606 P.2d 16 (1980); State v. Steelman, supra.

Appellant asserts that the court erred in determining that Greenawalt was not under substantial duress at the time of the events in question so as to constitute a mitigating circumstance under A.R.S. § 13-454(F)(2) (now § 13-703(G)(2)). Appellant argues that the testimony by correctional service officers to the effect that he was nervous and shaking during the prison escape and that Kathleen Ehrmentraut's, Greenawalt's companion in Flagstaff, testimony indicated that the Tisons virtually had control over Greenawalt. The prosecution in response argues that any nervous condition from which Greenawalt may have been suffering during the escape can be explained as due to the anxiety surrounding the events because of the underlying fear of either being captured or shot. The prosecution also argues that any claim that the Tisons had complete control over Greenawalt is untenable considering that he was armed throughout and his relative degree of freedom while in Flagstaff with Ehrmentraut. We concur with the interpretation of the facts by the prosecution because we think it is a more reasonable explanation of Greenawalt's behavior.

The appellant's next contention concerns the mitigating circumstances set forth in A.R.S. § 13-454(F)(3) and (4) (now § 13-703(G)(3) and (4)), which provide:

> "3. He was a principal, under 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

The trial court did not find either of these circumstances because there was no evidence from which the court could determine that Greenawalt's participation in the murders was relatively minor or that Greenawalt could not have reasonably foreseen that his conduct could cause or would create a grave risk of causing death to another person. Appellant argues that error was committed because without evidence before the court to demonstrate Greenawalt's actual participation in the crimes or that he had reasonably foreseen the risk of causing death, his burden of proof to establish mitigating circumstances had been fully met. We do not find the appellant's reasoning persuasive, however.

The burden of proof to establish mitigating circumstances is not met by the lack of proof, as the appellant contends, but by the production of some form of affirmative evidence from which it could be inferred that the defendant's participation was relatively minor or that he could not have reasonably foreseen the risk of death to another person. No evidence in support of subsections (3) and (4) of § 13-454(F), supra, was offered. We hold the claim that these mitigating circumstances should have been found is without merit.

Appellant seems to contend that the prosecution should be required to prove beyond a reasonable doubt the non-existence of mitigating circumstances. We adhere to our decision in State v. Watson, supra, where we rejected that contention.

Appellant's argument with regard to the findings of the mitigating circumstances is that the sentencing judge failed to consider some of the mitigating evidence presented by him. We find nothing in the record to support this assertion. As it was stated by the trial judge:

> "[a]ll information relevant to any mitigating circumstances, including but not limited to those set forth in Sec. 13-454(F), contained in the presentence report and presented at the sentencing hearing and received in evidence at the trial of the defendant has been considered by the Court."

The appellant contends that the imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Both the United States Supreme Court and this Court have previously rejected that contention. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); State v. Jordan, supra; State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980); State v. Watson, supra; State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908 (1978); State v. Richmond, supra.

We have considered before appellant's claim that the death penalty statute was not severable and held otherwise. See State v. Watson, supra; State v. Clark, ____ Ariz. ____, 616 P.2d 888 (1980); State v. Jordan, supra; State v. Steelman, supra; State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980); State v. Arnett, 125 Ariz. 201, 608 P.2d 778 (1980); State v. Evans, supra.

The appellant claims that our decision in State v. Watson, supra, was a prohibited exercise of legislative power which is irreconcilable with the separation of powers concept embodied in

Article 3 of the Constitution of the State of Arizona. Appellant bases this assertion on the effect of the Watson decision, which is to allow defendants convicted of first degree murder to present any mitigating circumstances at the sentencing hearing. The appellant asserts that the Court engaged in judicial legislation because the decision specifically contradicted the legislative intent in enacting the statute A.R.S. § 13-454(F). We have recently stated that our death penalty is carried out pursuant to a valid and enforceable statute and not by any judicially imposed penalty, State v. Mata, supra. The decision in Watson did not encroach on any function of the legislative branch since it simply carried out the responsibility of the judicial branch, even though there may be in some areas a seeming overlap of responsibility.

The appellant urges that the death penalty statute, A.R.S. § 13-454, under our decision in Watson is an ex post facto law prohibited by both Article I, Section 10 of the Constitution of the United States, and Article 2, Section 25, of the Constitution of the State of Arizona. This argument was adequately explored in Watson. There, in responding to the defendant's contention that the court's action was ex post facto, we said:

> "In the instant case, we are only concerned with a procedural change and one which increases the rights of the defendant in death penalty cases. We do not believe there is an ex post facto problem. We find no error." 120 Ariz. at 454, 586 P.2d at 1266.

See, e.g., State v. Jordan, supra; State v. Steelman, supra; State v. Arnett, supra.

The appellant claims that our decision in Watson constitutes the judicial enactment of a bill of attainder, in violation of Article I, Section 10 of the Constitution of the United States. A bill of attainder under the federal constitutional provision refers to legislative acts which inflict punishment without a judicial trial.

Cummings v. The State of Missouri, 71 U.S. (4 Wall.) 277, 18 L.Ed. 356 (1866); Ex parte Garland, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1866); United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946); United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). In United States v. Brown, supra, the United States Supreme Court stated: "* * * that the Bill of Attainder Clause was intended * * * as * * * a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature." 318 U.S. at 442, 85 S.Ct. at 1712, 14 L.Ed.2d at 488. We fail to see any merit in appellant's position, since our decision in Watson was a judicial one and did not in any respect usurp a power reserved to the legislative branch. See State v. Mata, supra.

The appellant contends that the imposition of the death penalty pursuant to our decision in State v. Watson, supra, violates the concept of fundamental fairness of the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States because it failed to give fair warning of the penalty that could be imposed. We rejected this contention in State v. Jordan, supra, and concluded that the effect of Watson was not unfair but was to the defendant's benefit by allowing the introduction of any mitigating factors at the sentencing hearing.

Appellant urges that the death penalty as set forth in A.R.S. § 13-454 and State v. Watson, supra, will be imposed wantonly, arbitrarily and freakishly because no ascertainable standards are provided for the sentencing court to measure the relative weights to be given to the aggravating and mitigating circumstances. This precise point was raised by the defendant in State v. Mata, supra. We recognized the problem of resolving the need for flexibility in order to afford individualized decision-making in capital cases and the need for standards to prevent arbitrariness when unbridled

discretion rests with the sentencer, but held that our death penalty statute was not violative of due process for this reason. We find it unnecessary to reconsider this issue at this time. See State v. Jordan, supra.

Appellant argues that the death penalty statute improperly fixes the burden of proof because it requires the defendant to prove the existence of mitigating factors, but does not require the prosecution to establish the existence of aggravating circumstances beyond a reasonable doubt. The first portion of the appellant's argument was answered in State v. Watson, supra. Appellant is not denied due process because, as we stated in State v. Smith, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980): "[f]acts which would tend to show mitigation are peculiarly within the knowledge of a defendant." And see State v. Jordan, supra.

Finally, appellant urges that the imposition of the death penalty upon a person who has been convicted solely on a felony murder theory constitutes grossly disproportionate punishment and violates the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the Constitution of the United States.

Appellant points out that the instant case went to the jury upon a theory of vicarious liability as the result of the application of the felony murder rule; that by showing that Greenawalt was part of a conspiracy to escape the Arizona State Prison and thereafter to avoid arrest, the State was able to take the case to the jury although it could not establish that he participated in the robbery of the Lyonses, ever fired a shot at the Lyonses or Theresa Tyson, in any way assisted in the robbery or shooting or ever intended that the Lyonses and Theresa Tyson be robbed or killed.

We do not agree, as we have said, that it can be inferred that appellant's part in the murders and robbery was minor. His statements

"We didn't kidnap the girl, * * *" and "Well, we left her there" indicate his active participation. Were it otherwise, appellant would have used language such as: "They didn't kidnap the girl, * * *" and "Well, they left her there."

Appellant points to the case of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). There, a plurality of four Justices, Burger, Stewart, Powell and Stevens, held the Ohio statute was unconstitutional because it limited the range of mitigating circumstances which could be considered by the sentencing court. The plurality was joined by concurring opinions from three other Justices, Blackmun, Marshall and White. Justice Blackmun recognized the nature of Arizona's mitigation statute. See footnote 3, 438 U.S. at 615-616, 98 S.Ct. 2954 at 2971, 57 L.Ed.2d at 996-997, and A.R.S. § 13-454(F)(3), quoted supra. He said:

> "The more manageable alternative in my view is to follow a proceduralist tack and require * * * that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea. That approach * * * merely requires that the sentencing authority be permitted to weigh any available evidence adduced at trial or at the sentencing hearing, concerning the defendant's degree of participation in the homicide and the nature of his mens rea in regard to the commission of the homicidal act. A defendant would be permitted to adduce evidence, if any be available that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force."

Following the decision in Lockett v. Ohio, we held in State v. Watson, supra, that a restriction on mitigating circumstances "does not pass constitutional muster", saying:

> "The matter will have to be remanded for sentencing at which time the defendant will be allowed to present any mitigating circumstances tending to show why the death penalty should not be imposed."
> 120 Ariz. at 445.

Watson stands for the proposition that any relevant evidence of mitigating circumstances can be shown from which the sentencing judge can conclude the death sentence should not be imposed.

It was therefore the law in Arizona at the time of the appellant's sentencing, and since, that a defendant could show at his sentencing hearing his participation in the homicides was relatively minor. This the appellant did not do, nor did he attempt to do so. No evidence was introduced at the sentencing hearing concerning the extent of appellant's participation in these homicides or the nature of his mens rea in regard to commission of the homicidal acts. Appellant had the opportunity to show that the death penalty was grossly disproportionate by evidence of the limited degree of his participation. The court specifically found:

> "3. There is no evidence or information of any kind to permit this court to find that the defendant's participation in the murders was relatively minor."

In sustaining our obligation to review the imposition of the death penalty, see State v. Richmond, supra, we have examined in detail the record in this case and have concluded in the light of the wanton disregard for human life, the brutal nature of the killings and appellant's two former convictions of other ruthless murders that the punishment imposed is neither excessive nor disproportionate to the offenses committed.

For the foregoing reasons, the judgments are affirmed.

FRED C. STRUCKMEYER, JR.
Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN, Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

FRANK X. GORDON, JR., Justice

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NO. 80-6614

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RANDY GREENAWALT,

Petitioner,

ORIGINAL COPY

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT

OF ARIZONA

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Respondent agrees that the Petition is timely filed, having been filed within 60 days of the denial of rehearing by the Arizona Supreme Court. However, under this Court's 1980 revision of its rules, the proper citation is to Rule 20.1 and 20.4.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is, for the most part, accurate and acceptable to respondent; there are, however, some details which bear correcting. (1) The argumentative statement that the pretrial publicity was "prejudicial" (Petition at 8) is not accepted; the Supreme Court of Arizona held precisely the opposite view of the publicity. (2) It was never demonstrated on the record that petitioner's initial appearance was delayed in order to subject him to further interrogation. (Petition at 9.) (3) All persons were not "searched" every time they entered the courtroom. (Id.) Whether the jurors were electronically scanned depended upon the degree of control possible when they left the courtroom. (See response to Question Presented No. 5, infra.) Other aspects of the facts will be expanded upon at appropriate points in the argument which follows.

REASONS FOR DENYING THE WRIT

At the outset it should be pointed out that there is what might be termed a technical or formal reason for denying this Petition. Rule 21.5 of this Court states quite plainly that a failure to present with "clearness whatever is essential to a ready and adequate understanding of the points requiring consideration" will be grounds for denial. Respondent submits

that, while brevity is generally a virtue this Petition is so brief that it fails to adequately inform the Court of what petitioner is complaining about, or why. For example, this Court in Rule 17.1(b) and (c) has provided guidelines as to the considerations bearing on whether or not certiorari should be granted in cases originating in the state courts:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Apart from one unilluminating reference to Miranda v. Arizona (in Question Presented No. 3), petitioner has completely failed to point out any conflict between the decision of the Arizona Supreme Court in this case and any decision of any other court, any action on questions of federal law so important they should be settled by this Court, or any conflict with the decisions of this Court. While Rule 17.1 is not, of course, absolutely controlling, the complete lack of compliance with it and with Rule 21.1 (j) seems indicative of the fundamental meritlessness of this Petition.

Even petitioner's feeble attempt to create a showing of decisional conflict (Petition at 9) is doomed to failure. The unidentified decisions he refers to are Richmond v. Cardwell, 450 F.Supp. 519 (D.Az. 1978) and State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924. Richmond v. Cardwell came first, on April 21, 1978, and held in a habeas corpus action that Arizona's death penalty statute was unconstitutional, as containing a limitation on the mitigating cir-

cumstances which could be presented. That was followed on July 3, 1978 by this Court's decision in Lockett v. Ohio, 438 U.S. 586, which struck down an Ohio statute on the same grounds. On July 20, 1978 the Arizona Supreme Court announced State v. Watson, which found the limitation on mitigation to be unconstitutional, but preserved the statute by severing the limitation. Petitioner's escape, murders, and recapture took place between July 30 and August 11, 1978. Thus, it is clear that rather than any conflict, there is in fact unanimity about the Arizona death penalty statute. This unanimity was conclusively demonstrated on April 18, 1980 when the same Federal District Court judge who had authored Richmond v. Cardwell issued Knapp v. Cardwell, No. CIV 78-385 PHX CAM (April 18, 1980.) (not yet published; copy is appendix II to this Response). That decision affirmed the validity of the action taken in Watson, and held that the Arizona statute was constitutionally utilized in sentencing persons to death under the guidelines set up in Watson.

In short, petitioner has given this Court nothing, in either his "Questions Presented" or his 124-word statement of "Reasons for Granting This Petition", which actually provides any warrant for granting the Petition. Further, this initial impression of meritlessness is amply supported by even a brief perusal of the facts and law pertinent to each of his specific "Questions Presented":

1. Failure to appoint public opinion pollster.

Petitioner's discussion of this issue in his Opening Brief to the Arizona Supreme Court is attached as Appendix I to this Response. Even the most cursory examination of that argument and the manner in which the Arizona Supreme Court resolved it (Appendix A to Petition at 3-4) leaves no doubt that this matter was presented

and decided below purely as a question of state statutory construction; the Federal constitutional question was neither briefed nor considered. Under 28 U.S.C. § 1257 (3) this Court may not pass upon federal questions which have not been "set up or claimed" in the state court.

> "[W]hen as here there can be no pretence that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong. Nickel v. Cole, 256 U.S. 222, 225, 41 S. Ct. 467, 468, 65 L.Ed. 900."
> Wolfe v. North Carolina, 364 U.S. 177, 195 (1960).

This is just such a case, so this Court lacks jurisdiction to deal with Question Presented No. 1.

2. Limitation on use of an investigator. This Court has repeatedly made clear that it does not sit to give advisory opinions, or to pass upon merely abstract and hypothetical issues. In order to possess the sort of personal stake which confers standing, the party seeking review must be able to allege some actual or threatened injury to himself. See, e.g., Linda R.S. v. Richard D., 410 U.S. 614, 616-17 (1973). The Arizona Supreme Court specifically found that the record of this case revealed no instance in which the trial court "either denied such a request for an investigator or refused a requested area of investigation..." (Appendix A to the Petition at 5.) Petitioner can, therefore, point to no actual personal injury, and this claim fades into the hypothetical, non-justiciable category.

3. Claimed violations of right to silence and right to counsel. Petitioner has asserted that in the process of interrogating him after his capture, the Arizona authorities violated his right to remain silent as well as his right to the assistance of counsel. These issues were exhaustively considered

by the Arizona Supreme Court and decided against him (see Appendix to Petition at 5-15), but this Court's very recent action in reversing the Arizona Supreme Court on an interrogation question, Edwards v. Arizona, No. 79-5269, ___U.S.___, 29 Cr.L. 3037 (May 18, 1981), may lend petitioner's allegations of error an appearance of validity they do not actually possess. Careful comparison shows that this case does not suffer from the analytical defects present in the Arizona Supreme Court's approach to Edwards, and is also factually distinguishable from it.

This Court pointed out that a major problem in Edwards was the Arizona Supreme Court's truncated mode of analysis; all the Miranda considerations were lumped together under the head of "voluntariness", and no attempt was made to focus separately on whether Edwards had knowingly and intelligently waived his right to counsel, in accordance with Johnson v. Zerbst, 304 U.S. 458 (1938). The situation in this case is very different. Here the Arizona Supreme Court did deal at length with whether or not petitioner's statement to the authorities was voluntary. (Appendix to Petition at 12-15.) However, before even getting to the matter of voluntariness it had separately dealt with the knowingness and intelligence aspects of the rights waiver. The specific Johnson v. Zerbst language, as reiterated in Brewer v. Williams, 430 U.S. 387 (1977) and applied in a prior Arizona case, was quoted. (Appendix to Petition at 10.) The Arizona Supreme Court then specifically stated:

> The trial court's denial of the motion to suppress was correct. That appellant knew and understood his constitutional rights to remain silent and to have an attorney present during questioning is evidenced by his exercise of those rights. Further, appellant through intelligent exercise of his rights controlled all questioning by selectively choosing which officers with whom he would speak.... He controlled the questioning by responding only to the specific questions he wanted to answer and refusing to respond to others.

(See also the summary of findings, id. at 14-15.) Thus, there is no question that all of petitioner's contentions were properly analyzed by the Arizona Supreme Court.

Of even greater importance, however, is a very basic factual distinction between this case and Edwards: Robert Edwards never saw a lawyer before being re-interrogated, while petitioner had consulted with counsel only a short time before the questioning which led to the statements introduced against him. The detective who obtained that statement testified at the suppression hearing:

> Q. "And you, yourself, were never told by anyone that Mr. Greenawalt had previously requested an attorney?
>
> A. He told me, he, himself, told me that he had an attorney, but he still wanted to talk to me about certain things."
>
> (Appendix to Petition at 11.)

This single statement should lay to rest all of petitioner's Fifth and Sixth Amendment claims - he knew he had a right to silence, he knew he had a right to counsel, he had seen his attorney, and deliberately chose for purposes of his own to selectively waive those rights. There may be a "heavy burden" on the state to prove valid relinquishment of such rights, Brewer v. Williams, supra, but if ever there was a case where that burden was sustained, this is it.

4. Pretrial publicity. The topic of pretrial publicity was examined in exhaustive detail by the Arizona Supreme Court, which considered all the possible remedial measures proposed because of the publicity (such as continuance of the trial date, voir dire format, jury sequestration, and change of venue or venire), as well as the nature of the jurors ultimately selected and the type of media coverage which allegedly prejudiced them. (See Exhibit A to the Petition at 15-24.) It concluded that the trial atmosphere had not been tainted, as it had been in the cases where

this Court found it necessary to intervene, and that regardless of the publicity the jury finally chosen was a fair and impartial one (as demonstrated by an extremely careful but remarkably uncomplicated voir dire). There being neither the "corrupted atmosphere" of Sheppard v. Maxwell, 384 U.S. 333 (1966), which created a presumption of prejudice, nor the actual prejudice revealed through a painfully protracted voir dire described in Irvin v. Dowd, 366 U.S. 717 (1961), there is no reason for this Court to review the matter.

5. "Searching"of jurors. Security matters have traditionally been left to the sound discretion of the trial court and it is up to the defendant to show prejudice. See e.g., United States v. Kress, 451 F.2d 576 (9th Cir. 1971) cert. denied 406 U.S. 923; United States v. Bankston, 424 F.2d 714 (5th Cir. 1970); Gregory v. United States, 365 F.2d 203 (8th Cir. 1966), cert. denied 385 U.S. 1029; Dupont v. Hall, 555 F.2d 15 (1st Cir. 1977). What petitioner characterizes as a "search" apparently was no more than electronic scanning, (R.T. Vol. III at 319; 383, line 26, 388.) The use of this relatively unobtrusive security measure was appropriate because of the high feelings likely to be generated by the totally unnecessary mass murders with which petitioner was charged, and the physical circumstances of the trial. The Yuma courthouse is a cramped and antiquated structure. (R.T. Vol. I at 73; Vol. II at 220; Vol. III at 359.) In fact, a separate jury room was not always available, depending on the status of cases being tried in other courtrooms. (Vol. II at 229.) Most importantly, the jurors had to enter the courtroom through the same door used by spectators. (Vol. VI at 997, lines 18-19.) This obviously made it difficult to maintain security; jurors and spectators would often be intermingled as they entered the courtroom after a recess. When the security personnel

were able to keep tabs on the jurors, because they were able to use a jury room or stayed on the floor where the courtroom was located, they were not scanned. (Vol. VI at 933.) At other times, when such separation could not be accomplished, the scanning was necessary. Similar use of magnetometers has been repeatedly upheld in both Federal and state courts. See United States v. Howell,514 F.2d 710 (5th Cir. 1975), cert. denied 429 U.S. 838; United States v. Kelly, 551 F.2d 760 (8th Cir. 1977), cert. denied 433 U.S. 912; State v. Myrick, 616 P.2d 1066 (Kansas 1980). There being neither abuse of the trial court's discretion nor any demonstrated prejudice to petitioner, this issue does not merit review.

6. Per se unconstitutionality of death penalty. That capital punishment is not unconstitutional has already been settled by this Court. Gregg v. Georgia, 428 U.S. 153 (1976).

7. Severability of defective portion of Arizona death penalty statute. This Court has repeatedly pointed out that the "state courts are the ultimate expositors of state law, . . . and . . . we are bound by their constructions except in extreme circumstances . . .". Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S.Ct. 1881, 1886, 44 L.Ed.2d 508, 515 (1975). The severability of a state statute is a state question and the decision of the state court is conclusive because the task of determining the intent of the state legislature, like the function of interpreting a state statute, rests primarily with the state courts. See, e.g., Charles Wolff Packing Co., v. Court of Industrial Relations of Kansas, 267 U.S. 552 (1925). Therefore, this issue raises only a non-Federal question, and is not a proper basis for action by this Court.

8. Supposed transgression of Arizona constitution. This is plainly a matter of state law only, which this Court lacks any jurisdiction to address.

9. Ex Post Facto Clause. The Arizona Supreme Court's action in Watson was both procedural and ameliorative, and as such could not have been an Ex Post Facto Clause violation. Dobbert v. Florida, 432 U.S. 282 (1977). However, even if Watson could have been such a violation as to others, such as those who had been convicted prior to Watson, it could not possibly have been ex post facto to petitioner; the Watson decision was announced on July 20, 1978, ten days before petitioner's prison break and murderous rampage.

10. Bill of attainder. The decision in Watson, by definition, is incapable of being a bill of attainder. "A bill of attainder is a legislative act, which inflicts punishment without a judicial trial." Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323, 18 L.Ed. 356, 363 (1967); see also United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707, 15 L.Ed2d 484 (1965). A decision by a court obviously is no legislative act at all, and no penalty will be imposed as a result of Watson except pursuant to a normal, court-imposed sentence.

11. Sufficiency of notice. While it is not plainly stated in the Petition, petitioner's due process contention below was that the alleged conflict between the decision of the District Court of Arizona in Richmond v. Cardwell and the Arizona Supreme Court's action in Watson created such ambiguity about the status of Arizona's death penalty that he lacked adequate notice of the penalty he faced for murder. This position is untenable. A United States District Court is not a court of last resort, so there really was no conflict at all, and the very fact that petitioner claims ambiguity indicates awareness that the State of Arizona would probably still attempt to impose death for murder. Thus, the capital punishment statute continued to exist as an "operative fact" and petitioner had enough notice to guide his conduct. Cf. Dobbert v. Florida, supra.

12. Lack of explicit standards for comparing aggravating and mitigating circumstances. The lack of such standards has already been held by this Court not to violate the Constitution. Proffitt v. Florida, 42 U.S. 242, 257-58 (1976).

13. Burden of proving mitigation on defendant; insufficient burden on state in proving aggravation. This Court has held that a burden of proof may be allocated to the defendant, even at the guilt-innocence stage. Patterson v. New York, 432 U.S. 197 (1977) (proof of affirmative defense). Under the Arizona death penalty statute, the defendant has the burden of showing anything only at the sentencing stage, after guilt has been determined, and only where an aggravating circumstance has been established; if no aggravating factor is present, a life sentence would be automatic. The principle established in Patterson clearly governs here, and so requiring proof of mitigating factors by the defendant, who obviously is in a substantially superior position to know about them is certainly acceptable under the Constitution. As for the prosecution's burden of proof on aggravating circumstances, this has been held to be proof beyond a reasonable doubt, State v. Jordan, 126 Ariz. 282, 614 P.2d 825 (1980), and Jordan was specifically referred to by the Arizona Supreme court in answering this contention. (Appendix A to Petition at 44.) It must, therefore, have found that the aggravating circumstances in this case had been proved beyond a reasonable doubt when it stated that they had been "properly established". (Id. at 37.) No higher burden has ever been required in any phase of a criminal case, so none should be imposed now.

14. Death penalty for felony murder. The legal question of whether the death penalty can be imposed in a felony murder case seems to have been answered by the various opinions in Lockett

v. Ohio, 438 U.S. 586 (1978). Though varying in the details of their approaches, six memebers of this Court indicated that, in appropriate circumstances, death could be imposed in a felony-murder case. Justice Rehnquist flatly rejected the proportionality analysis utilized by Justice White. 438 U.S. at 635-36. The plurality opinion, joined in by Justices Burger, Stewart, Powell, and Stevens, required only that all circumstances of the offense must be open to examination as mitigating factors. (Id. at 604-608.) There was never any suggestion that death could not be imposed simply because the case was tried under a felony-murder rule. Justice Blackmun likewise demanded only that the defendant's degree of participation be a mitigating factor available for consideration in sentencing. (Id. at 613-617.) That is precisely what was required by the Arizona statute, which included the following as specified mitigating factors, even before the Arizona Supreme Court severed the limitations on mitigation evidence:

> "3. He was a principal, under §13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."
> Ariz. Rev. Stat. Ann. §13-454(F) (now §13-703(G)).

This leaves only the question of the propriety of the death sentence in this particular case, which largely depends on the facts. In his statement of the question, petitioner suggests that he was not directly involved in the murders, but the record is otherwise. While no one testified to seeing petitioner pull the trigger, it was very clear that he had actively participated in every aspect of the prison escape,

evasion of pursuit, and attempts to avoid recapture. (See Appendix A to the Petition at 2-3, 6, 8, 25-26, 29, 32-33, 39.) As a result, the Arizona Supreme Court was quite unable to conclude that his participation in the crime was minor. (Id. at 44-45.) Moreover, though provided a clear opportunity at the aggravation-mitigation hearing to present evidence of his degree of participation, which could perhaps have shown that the death sentence was not appropriate, petitioner did not do so. There being substantial evidence that petitioner was fully active in every facet of the gang's illegal odyssey, and he, the one who knows, having shown nothing to the contrary, it hardly lies with him to claim that the sentence is disproportionate. This is particularly true when it is noted that the sentencing judge specifically took petitioner's conviction on a felony-murder theory into account as a possible mitigating circumstance. (R.T. Vol. VII at 1144.) Petitioner received the benefit of every consideration but when the weighing was done the depravity of his crimes, combined with the wickedness of his prior life (i.e., two other murder convictions), made it clear both to the trial court and the Arizona Supreme Court that death was the appropriate penalty. This Court should not interfere with that outcome.

C O N C L U S I O N

This Petition does not present the sort of "special and important reasons" required by Supreme court Rule 17.1 before the writ of certiorari should issue. The Petition must, therefore, be denied.

No. 80-6614

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SUPREME COURT, U.S.

ARGUMENT AND AUTHORITIES

I.

THE TRIAL COURT ERRED IN REFUSING TO GRANT THE APPELLANT'S REQUEST FOR APPOINTMENT OF AN EXPERT TO CONDUCT A PUBLIC OPINON SURVEY.

The appellant filed a request for the appointment of an expert for the purpose of conducting a public opinon poll in order to determine the extent to which the pre-trial publicity in this case had permeated the community. Citing Rule 10.3(b), Rules of Criminal Procedure, 17 A.R.S., the appellant pointed out that he was required to establish that the prejudicial pre-trial publicity would probably result in the appellant's being denied a fair trial.

It is the appellant's position that where, as in this case, the public has been subjected to an extended barrage of highly inflamatory publicity directed against a defendant, it is difficult to apply traditional standards in determining whether or not fair and impartial jurors may be chosen in a locality. This position is recognized by Rule 462, Uniform Rules of Criminal Procedure (Vol. 10, Uniform Laws Annotated, Master Edition, West (1974)). That rule provides that a motion for change of venue may ". . . be supported by qualified public opinon surveys or opinion testimony of individuals."

Such surveys are no longer mere numerical surveys but, rather, are now professionally designed to determine the actual opinions held by members of the public and the strength

Appendix I.

of such opinions. This is especially important in cases such as this where the sheer quantum of publicity, irregardless of the person's specific recall of particular matters, has had a serious impact upon their state of mind. Such effects are not readily demonstrable by the use of affidavits and the traditional voir dire procedures, relying as they do upon specific responses to specific and unweighted questions. The use of experts, trained in proper sampling techniques, is indispensible in such cases.

The appointment of experts in capital cases is specifically provided for by Sec. 13-1673, A.R.S., as amended. It was, therefore, error for the trial court to deny this request.

II

THE TRIAL COURT ERRED IN LIMITING THE USE OF AN INVESTIGATOR FOR THE APPELLANT TO MATTERS PRESENTED TO AND APPROVED BY THE COURT.

The appellant filed a request for the appointment of an investigator to assist the appellant's counsel in the preparation of this matter. The Court, upon hearing the request, entered the following order as a part of the minute entry to the omnibus hearing held on September 12, 1978:

> "IT IS NOW ORDERED: an investigator will be appointed from time to time based upon counsel's representation to the Court of the necessity of an investigation. These requests will be heard by the Court alone, in camera."

Later, in the same minute entry, the order was modified as follows:

JUN 2 1981
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SUPREME COURT, U.S.

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MAY 6 1980
ATTORNEY GENERAL OF ARIZ.
TUCSON OFFICE

APR 18 1980
W. J. PURTELL, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOHN HENRY KNAPP, et al.,
Petitioners,
vs.
HAROLD J. CARDWELL,
Respondent.

No. CIV 78-385 PHX CAM

OPINION
AND
ORDER

On May 13, 1978, petitioner John Henry Knapp, an inmate on Arizona's death row, brought before this Court, pursuant to 28 U.S.C. § 2254, a Petition for Writ of Habeas Corpus, seeking to enjoin his execution by respondent. After court proceedings in this, and other related cases, Knapp's action has reached its present posture. A brief historical review will be helpful to an understanding of the issues presented to the Court.

In 1973, the Arizona legislature adopted A.R.S. §§ 13-453[1] and 454[2], both of which have since been repealed. Section 13-453 stated that upon conviction of murder in the first degree, a defendant could be sentenced to either death or to life imprisonment without parole for twenty-five years. Section 13-454 set forth the procedure by which the death penalty could be imposed. It provided that once the state proved the existence of one or more

Appendix II.

of the "aggravating circumstances" contained in subsection E of the statute, the burden of proof switched to the defendant to establish "mitigating circumstances." If the defendant were unable to do so, death was mandatory. Subsection F of Section 13-454 listed four mitigating circumstances that could be considered by the court.

On December 20, 1976, in State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1977), the Arizona Supreme Court held that the mitigating circumstances enumerated in A.R.S. § 13-454(F) were intended to be exclusive and that sentencing courts were powerless to consider other factors such as defendant's age, his prior record, or the extent of his cooperation with the authorities. The court's restrictive interpretation of subsection F was reaffirmed in State v. Bishop, 118 Ariz. 263, 576 P.2d 122 (1978).

On April 21, 1978, two death-row inmates petitioned this Court for writs of habeas corpus, pursuant to 28 U.S.C. § 2254, alleging the unconstitutionality of A.R.S. § 13-454 as interpreted in State v. Richmond, supra, and State v. Bishop, supra. Richmond v. Cardwell, 450 F.Supp. 519 (D. Ariz. 1978). The Court concluded that the failure of Section 13-454 to permit consideration of all relevant mitigating circumstances violated petitioners' rights under the eighth and fourteenth amendments of the United States Constitution and enjoined the state from putting petitioners to death. Id. at 526.

On May 2, 1978, the Arizona Supreme Court directed the execution of John Henry Knapp. Knapp immediately instituted the present action, alleging that the Court's reasoning Richmond v. Cardwell, supra, as applicable to all inmates on Arizona's death row. On May 12, 1978,

this Court entered an order permitting Knapp's suit to proceed as a class action under Rule 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure and enjoined respondent from imposing the death penalty on any State prisoners.

On July 3, 1978, the United States Supreme Court decided Lockett v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978), in which it struck down Ohio's death penalty statute for the same reasons given by this Court in Richmond v. Cardwell, supra.[3]

On July 20, 1978, the Arizona Supreme Court handed down State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), in which the court addressed the effect of Lockett on its position that Section 13-454 limited the mitigating circumstances that could be considered by a sentencing court with respect to defendants convicted of first-degree murder. Although the Arizona court found this restriction unconstitutional, it held that had the state legislature been aware of the problem, it would have permitted consideration of all relevant mitigating circumstances. Thus, the court ruled that the constitutional portion of A.R.S. § 13-454 was "severable" from that which was unconstitutional, and remanded defendant's case for resentencing under the newly-construed statute.

On May 1, 1979, the Arizona legislature adopted the present version of A.R.S. § 13-703[4] which, in essence, codified the changes made in State v. Watson, supra. As a result of the Watson decision, and the enactment of Section 13-703, Arizona's death row now consists of the following groups of inmates: those sentenced or resentenced pursuant to Watson; those sentenced pursuant to Section 13-703; and those sentenced prior to Watson whose

resentencing is now pending. This opinion is concerned only with the effect of the Watson decision on the constitutionality of the death penalty in Arizona. The validity of Section 13-703, or the sentences of those sentenced pursuant to it, is not at issue in this case.

THE PRESENT MOTION

On January 9, 1980, respondent moved to dissolve this Court's injunction of May 10, 1978, on the basis that the above inmates had been (or will be) sentenced under a procedure that permits consideration of all mitigating circumstances.[5] Petitioners, through counsel, filed numerous responses, some of which raised a variety of legal issues.[6] Oral argument was held on February 25, 1980, after which the Court took the matter under advisement. Since oral arguemnt, two petitioners have filed supplemental memoranda, and respondent has replied thereto.

At the heart of respondent's motion is the validity of the Arizona Supreme Court's decision in State v. Watson, supra. There is no question that Watson professes to remedy that which was the basis of this Court's original injunction. The issue is whether the means chosen by the Arizona Supreme Court are subject to constitutional objections.

DID WATSON DELETE LANGUAGE FROM SECTION 13-454?

Several petitioners argue that the Watson Court deleted subsection F from Section 13-454, thereby severing the statute's list of the mitigating circumstances a court must consider in its decision whether to impose death. From this proposition, it is urged that all statutory reference to subsection F is meaningless and that Section

13-454 is rendered void for vagueness. Alternatively, it is argued that without subsection F, sentencing courts are no longer permitted to consider any mitigating circumstances -- a clear violation of the eighth amendment. This Court's analysis of Watson makes it unnecessary to address the merits of either of these contentions.

While Watson was not overly explicit as to the means by which it constitutionalized Section 13-454, a close reading of the case makes it apparent that the Arizona court altered the statute through reinterpretation rather than by deleting specific statutory language. This conclusion is supported by two findings. First, the restriction on mitigating circumstances that was "severed" in Watson cannot be found in the express language of Section 13-454. Rather, it was the product of the court's prior interpretations in State v. Richmond, supra, and State v. Bishop, supra. Second, at no point in the Watson decision did the court invalidate or strike specific language of Section 13-454. It removed only that portion of the statute which restricted mitigating circumstances.

Section 13-454 contains no language which demands the restrictive view of State v. Richmond and State v. Bishop that "subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F." State v. Richmond, 114 Ariz. at 204, 560 P.2d at 50. Subsection F gives no express indication of whether its list was intended to be illustrative or exclusive. It merely states "mitigating circumstances shall be the following . . . ."[7] While subsection D requires the sentencing court to "take into account the . . . mitigating circumstances enumerated in subsection F," it stops short of limiting the court to

those circumstances. Instead, subsection D states that the sentencing judge "shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency." (Emphasis added.)

Since the restriction on mitigating circumstances with which Watson was concerned cannot be found in the express language of subsections D or F, it must have been the product of judicial interpretation. This being the case, it is more likely that the court would remove the restriction by reinterpretation rather than by severing an identifiable portion of the statute.[8]

The view that the Watson decision was intended to overrule the Arizona Supreme Court's own restrictive interpretations of Section 13-454 in State v. Richmond and State v. Bishop, rather than to delete specific statutory language is supported by a careful examination of the Watson opinion itself. Nowhere did the court state that subsection F in its entirety was unconstitutional. It merely invalidated that provision "insofar as it limits the right of the defendant to show additional circumstances . . . ." State v. Watson, 120 Ariz. at 445, 586 P.2d at 1257 (emphasis added).[9] Similarly, the court never expressed the desire to excise particular words or subsections from Section 13-454. Rather, the court spoke of the "unconstitutional portion" and the "offending portion," id. at 445, 586 P.2d at 1257, and held that "the statute remained in full force and effect and that only the portion limiting the factors in mitigation should be set aside." Id. at 452, 586 P.2d at 1264 (emphasis added). At no point did the court set aside the "factors" themselves.

This Court's reading of Watson convinces it that when the Arizona Supreme Court posed the question "whether the constitutional and unconstitutional portions of A.R.S. §§ 13-453 and 454 are severable so that the constitutional portion of the statute can remain in force and effect," State v. Watson, 120 Ariz. at 445, 586 P.2d at 1257, the court was not speaking in terms of lopping off actual statutory language. It was merely asking whether the statute could stand without its restrictive interpretation.[10] So viewed, the post-Watson version of Section 13-454 is neither void for vagueness nor violative of the eighth or fourteenth amendments.

JUDICIAL LEGISLATION

Petitioners argue that the Arizona Supreme Court's alterations of Section 13-454 are unconstitutional in that they are supported by neither the legislative history nor the language of the statute.[11] In the face of such contentions, the role of a federal court is limited.

The Supreme Court has established that state courts can use statutory interpretation to validate otherwise questionable death penalty statutes. Lockett v. Ohio, supra; Proffitt v. Florida, 428 U.S. 242 (1975).[12] Moreover, it is axiomatic that courts should construe legislation in a constitutional manner "if fairly possible." Crowell v. Benson, 285 U.S. 22, 62 (1932). See also Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). So far as federal courts are concerned, the general rule is that the statutory interpretation of the highest court in the state is "as though written into the [statute] itself," Poulos v. New Hampshire, 345 U.S. 395, 402 (1953), and that state courts "have the final authority to interpret and, where

they see fit, to reinterpret that State's legislation." Garner v. Louisiana, 368 U.S. 157 (1961) (emphasis added). See also, Wainright v. Stone, 414 U.S. 21, 22-23 (1973); N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963); Winters v. New York, 333 U.S. 507, 514 (1947). In passing on the question whether a Kansas antitrust statute was an unconstitutional infringement on the freedom to contract, the Supreme Court stated:

> It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. . . . Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize. . . . The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.

Smiley v. Kansas, 196 U.S. 447, 455 (1904).

Petitioners argue that the Arizona Supreme Court's reinterpretation of Section 13-454 is nevertheless subject to federal review for the reason that its construction is manifestly unreasonable. Assuming for purposes of argument that such a finding would place petitioners within an exception to the general rule,[13] this Court's reading of Section 13-454 defeats petitioners' argument. While Arizona's death penalty statute is not explicit on the issue of mitigation, this Court does not find the Watson Court's construction to be unreasonable.

As previously stated, there is nothing in the express language of Section 13-454 that restricts a sentencing court's ability to consider mitigating circumstances. In fact, Arizona's death penalty law is remarkably similar to the Florida statute upheld by the United States Supreme Court in Proffitt v. Florida, supra, and reexamined in Lockett v. Ohio, supra.[14] The legis-

lative history of Section 13-454 is likewise ambiguous. While petitioners cite developments which they claim are compatible with the view that the Arizona legislature intended a restrictive reading of the statute, there is nothing that demands such a conclusion.[15]

Petitioners' only remaining argument is that the Arizona Supreme Court's refusal to retract its earlier position that the legislature intended a restrictive interpretation of Section 13-454 at the time of enactment precludes a finding that Watson's holding was the product of legitimate statutory construction. This argument is likewise without merit.

While it is true that the Watson Court maintained the view that "Section F of A.R.S. § 13-454 is exclusive in that pursuant to Section D of A.R.S. § 13-454, the Court may consider as mitigating circumstances only those contained therein," State v. Watson, 120 Ariz. at 444, 546 P.2d at 1256, the court went on to hold that, at the time of enactment, the legislature would have preferred a broad reading of subsections D and F to an invalidation of the entire statute. Noting that its restrictive reading of Section 13-454 was "'severable from the rest in such a way that the legislature would be presumed to have enacted them independently . . . ', State ex rel Berger v. Superior Court, 106 Ariz. 365, 370, 476 P.2d 666, 671 (1970)", State v. Watson, 120 Ariz. at 452, 586 P.2d at 1264, the Watson Court went on to state that:

> We believe there is sufficient evidence in the legislative history of the enactment of this statute as well as the statute itself from which it is apparent that had the legislature anticipated that the legislation on mitigating factors would be found unconstitutional they would still have enacted the rest of the statute. Indeed, there is more than ample indication that the legislature intended a death penalty statute

and were prepared to write one that complied with the United States constitutional guidelines. Id. at 453, 586 P.2d at 1265.

Given the facts that neither the language nor the legislative history of Section 13-454 compel the conclusion that the Arizona legislature was opposed to open mitigation, and the state supreme court's findings that, at the time of enactment, the legislature would have preferred reinterpretation to statutory invalidation, there is sufficient basis on which to uphold the Watson interpretation of A.R.S. § 13-454.[16] This Court is aware of no further constitutional requirement that the state supreme court hold that its reinterpretation was originally intended by the legislature.

DOUBLE JEOPARDY

Those petitioners who have been resentenced pursuant to Watson or whose resentencing is pending, argue that the double jeopardy clause of the fifth amendment to the United States Constitution protects them from the imposition of a second death penalty. This contention must be rejected.

The double jeopardy clause does not prohibit resentencing per se. It prevents only an increase in sentence, or the imposition of multiple sentences for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969); Ex parte Lange, 85 U.S. 163 (1873). Furthermore no change is proscribed unless a defendant's original punishment has commenced.[17] Suggs v. Wilson, 403 F.2d 52 (9th Cir. 1968).

For obvious reasons, none of the petitioners claims to have actually begun serving his death sentence.

Moreover, it cannot be argued that petitioners resentenced pursuant to Watson have been subjected to multiple or increased penalties unless, between sentencing and resentencing, their death penalties were somehow reduced to life imprisonment. The Watson Court concluded that the defendant's death sentence was "merely set aside" upon the court's resentencing order, and that there had been no reduction to life imprisonment:

> There is no doubt that the double jeopardy clause applies to sentencing as well as conviction, Ex Parte Lange, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873), and defendant cites several cases, two from California, People v. Harvey, 76 Cal.App. 3d 441, 142 Cal.Rptr. 887 (1978), and People v. Payne, 75 Cal.App. 3d 601, 142 Cal.Rptr. 320 (1977), as well as the South Carolina case of State v. Rodgers, 242 S.E.2d 215 (S.C. 1978) in support of his position. All three of these cases are distinguishable. In each of those cases, the defendants, after having been sentenced to death, had their sentences reduced to life imprisonment. After they had commenced to serve the life sentences, the state sought to have them resentenced under legislation enacted after the crime and the reversal. Thus, after the life sentences were at least partially served, the state attempted to subject them to another different and higher punishment. . . . We agree with the California court, but these cases are clearly distinguishable and do not apply to the case at bar. The defendant in the instant case never served his sentence (of death). His death sentence was not reduced to life imprisonment but was merely set aside pending resentencing. We find no violation of the double jeopardy clause in the instant case. See also North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

State v. Watson, 120 Ariz. at 453, 586 P.2d at 1265.

Petitioners argue that People v. Harvey, 76 Cal. App. 3d 441, 142 Cal.Rptr. 887 (1978), and People v. Payne, 75 Cal.App. 3d. 601, 142 Cal.Rptr. 320 (1977), the two California Court of Appeals decisions distinguished in Watson, reflect a common law doctrine that "automatically"

imposes life sentences upon state death row inmates following the invalidation of a state's death penalty statute.[18] These cases do not support such an assertion.

In Rockwell v. Superior Court of Ventura County, 134 Cal.Rptr. 650, 556 P.2d 1101 (1976), which preceded Payne and Harvey, the California Supreme Court invalidated California's death penalty statute. Unlike the Watson Court, however, the Rockwell Court found that the revisions suggested by the government would exceed the scope of legitimate statutory interpretation and would be "contrary to manifest legislative intent." Id. at 665, 556 P.2d at 1116. Since the court was unable to repair the statute, it severed the portion authorizing the death penalty from the remaining penalty provisions and ordered that "petitioner may therefore be sentenced to a term of life imprisonment." Id. Given this language, the California Court of Appeals in People v. Harvey, supra, held that the "practical effect" of the Rockwell decision "automatically reduced appellant's sentence to life imprisonment." People v. Harvey, 76 Cal.App.3d at 447, 142 Cal.Rptr. at 891. See also People v. Payne, supra (in which the court of appeals had actually reduced the defendant's death sentence to life imprisonment pursuant to Rockwell prior to the state's motion for resentencing).

Contrary to petitioner's assertions, the above rulings by the California Court of Appeals did not and could not establish a common law doctrine applicable in all cases and all states where a death penalty statute has been invalidated. The Rockwell decision, which was interpreted in Harvey and Payne, is similar to State v. Watson only in that in each case the supreme court of a state was exercising its prerogative of passing on the

constitutionality of the respective state's death sentencing procedures. While the Watson Court found that the Arizona statute could be saved through statutory interpretation, the California court reached a contrary conclusion. In addition, the Watson Court held that the effect of its ruling was to simply "set aside" the defendant's death sentence pending resentencing, while the Rockwell Court held that the defendant's sentence must be reduced to life imprisonment.

This Court is aware of no constitutional principle which prohibits the course taken by the Watson Court, and finds that the question whether a state court's invalidation of its death penalty statute actually triggers a lesser sentence or merely "sets aside" a defendant's death penalty "pending resentencing" is one of state, and not constitutional law.

Petitioners' second double jeopardy argument is that Arizona statutory law operated to impose life sentences on petitioners the moment Watson invalidated its prior restrictive interpretations of Section 13-454. They point to Chapter 138, Laws of 1973, Section 10, which provides that

> In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who had been sentenced to die shall be resentenced by the sentencing court to life imprisonment . . . . (Emphasis added).

On the question whether Section 10 is applicable to the facts at hand, the Watson Court stated:

> Defendant contends that since we have found the death penalty unconstitutional, we therefore must sentence the defendant to twenty-five years. We do not agree.
>
> We did not find the death penalty to be unconstitutional. We held only that in

> in determining the death penalty there are certain factors which, if presented by the defendant, the court must consider. The statute, as severed is valid.

State v. Watson, 120 Ariz. at 453, 586 P.2d at 1265. The Arizona Supreme Court's holding that the life-sentence provision of Section 10 is activated only upon invalidation of the death penalty itself, as opposed to the statutory sentencing procedure, is not unreasonable.[19] This Court, therefore accepts the State court's interpretation of its own law, Poulos v. New Hampshire, 345 U.S. 395, 402 (1953), and holds that petitioners' resentencing pursuant to Watson does not violate the double jeopardy clause.

EX POST FACTO

The ex post facto clause of the United States Constitution prohibits:

> any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to the law at the time when the act was committed. . . .

Beazell v. Ohio, 269 U.S. 167, 169 (1925), (emphasis added); United States Constitution, art. I, § 10, cl. 1. Decisions by the Supreme Court demonstrate that the ex post facto clause embodies the concept that persons have a right to fair warning of the conduct which will give rise to criminal penalties:

> The constitutional prohibition and the judicial interpretation of [the ex post facto clause] rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

269 U.S. at 170. Although the ex post facto prohibition applies of its own force only to legislative acts, the Court has struck down unforeseeable judicial enlargements of criminal statutes as violative of due process when applied retroactively. See Marks v. United States, 430 U.S. 190 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964).

Petitioners contend that the retroactive application of Watson's interpretation of Section 13-454 amounts to the imposition of an ex post facto penalty in two respects. Emphasizing Watson's finding that a portion of Section 13-454 was unconstitutional, petitioners argue that the ex post facto clause protects them from the application of a newly enacted penalty.

Petitioners' second argument alleges that the differences between Section 13-454 and post-Watson sentencing are such that the retroactive application of the latter is likewise unconstitutional. The United States Supreme Court's recent decision in Dobbert v. Florida, 432 U.S. 282 (1977), answers both of petitioners' contentions.

In Dobbert, a Florida defendant was convicted of several murders which had occurred prior to April 8, 1972. The death penalty in effect at the time the murders were committed mandated that a person convicted of a capital felony was to be punished by death unless a majority of the jury recommended otherwise. On July 17, 1972, the Florida Supreme Court struck down this procedure as violative of the eighth and fourteenth amendments. Donaldson v. Sack, 265 So.2d 499 (Fla. 1972). Before Dobbert's trial, however, the Florida legislature enacted a new death penalty procedure which gave the court sole responsibility for sentencing. The defendant was tried and sentenced pursuant to this latter statute.

Like petitioners, Dobbert attempted to avoid his death penalty by emphasizing the fact that the sentencing statute in effect at the time of the murders was later held unconstitutional. The Supreme Court rejected the significance of this point, stating that the mere fact that a penalty statute is invalidated after a crime has been committed does not render the imposition of the same penalty a violation of the ex post facto clause if, at the time of the offense, "the existence of the statute served as an 'operative fact' to warn the [defendant] of the penalty which [the state] would seek to impose on him if he were convicted. . . ." 432 U.S. at 298.

While it cannot be seriously argued that Section 13-454 failed to serve as an "operative fact" in terms of the above quotation,[20] several petitioners would distinguish Dobbert on the basis that the defendant in that case was tried and sentenced under a constitutional death penalty statute. Those who were tried between the dates of this Court's decision in Richmond v. Cardwell and the State's decision in Watson and then sentenced pursuant to Watson point out that they were tried at a time when the state was enjoined from imposing the death penalty. Similarly, those petitioners who were tried and sentenced under the pre-Watson version of Section 13-454 and then resentenced under Watson emphasize that they were tried and sentenced pursuant to an unconstitutional death penalty statute before being resentenced under constitutional conditions.

While petitioners cite several state court decisions which have distinguished Dobbert on the basis that their defendants had been tried and sentenced under

unconstitutional death penalty statutes, including Meller v. State, 94 Nev. ____, 581 P.2d 3 (1978); State v. Rogers, 270 S.C. 285,242 S.E.2d 215 (1978), these cases do not state rationale which this Court finds persuasive in dealing with the facts before it. Dobbert, and other Supreme Court decisions discussing the ex post facto clause, see e.g., Beazell v. Ohio, supra, suggest that the two key areas for inquiry in the present case are the law at the time of the criminal act and the law at the time of final sentencing. The ex post facto clause only prohibits detrimental substantive alterations of the applicable law "at the time the act was committed." 269 U.S. at 169. This Court holds that, for ex post facto purposes, the status of the death penalty between the dates of petitioners' crimes and their final sentencing was irrelevant. What is important is that petitioners were forewarned of the existence of the death penalty at the time they committed their crimes and that the procedure by which they were ultimately sentenced was constitutional.[21]

Petitioners' second argument emphasizes the difference between the death sentencing procedures of Section 13-454, as interpreted in State v. Richmond, supra, and State v. Bishop, supra, and those under which they have been, or will be, sentenced. The Dobbert decision made it clear, however, that not all deviations from the law in effect on the date of an offense violate the ex post facto clause. See also Beazell v. Ohio, supra, Thompson v. Missouri, 171 U.S. 380 (1898); Hopt v. Utah, 110 U.S. 574 (1884). The retroactive application of a sentencing statute is permissible so long as the changes are either "procedural" or "ameliorative." Dobbert v. Florida, 432 U.S. at 293-94.

Statutory changes are procedural if they have "neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict." Id. at 293. See also Bearell v. Ohio, supra. If a change meets this definition, the "mere fact that it may work to the disadvantage of a defendant" is irrelevant. Id.[22]

Similarly, an "ameliorative" change, even if substantive, is one which fails to make a statute "more onerous than the prior law." Id. at 294. In making the determination whether a change is detrimental or ameliorative, the Court stated that "we must compare the two statutory procedures in toto to determine if the new may be fairly characterized as more onerous." Id.

The only difference between the pre-Watson version of Section 13-454, and the statute in its reinterpreted form, is that the Watson decision greatly expands the sentencing court's ability to consider mitigating circumstances. The Arizona Supreme Court's changes are thus "ameliorative" at worst, and cannot be relied on to show an ex post facto violation.

Petitioners who were, or will be, resentenced pursuant to Watson argue that despite the ameliorative nature of the Arizona Supreme Court's reinterpretation of Section 13-454, the resentencing court's ability to consider aggravating circumstances that may have surfaced since their original death sentences were imposed[23] renders the resentencing procedure unconstitutional.[24] This argument must also be rejected.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the United States Supreme Court stated that

> the freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in Williams v. New York, supra, that a State may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.'

Id. at 723 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)). The Supreme Court's words are equally applicable in this case. The ability of a resentencing court to consider aggravating circumstances of which the original court was unaware in no way "change[s] the quantum of punishment attached to the crime." Dobbert v. Florida, 432 U.S. at 293-94. See also Thompson v. Missouri, 171 U.S. 380 (1898); Hopt v. Utah, 110 U.S. 574 (1884). Nor can this procedure, when compared "in toto" with the changes effected by Watson, be "fairly characterized as more onerous." Id. at 294. The resentencing court can consider not only a greater variety of mitigating circumstances than was permissible prior to Watson, but it can also consider mitigating circumstances that may have come to light since a petitioner's first sentencing.

SPEEDY SENTENCING

Several petitioners argue that the circumstances of their cases are such that resentencing pursuant to Watson infringed their rights to speedy sentencing[25] and/or due process. These arguments are based on allegations that events have transpired since petitioners were originally sentenced which make resentencing unfair. The allegations include the death or unavailability of mitigation witnesses, excessive delay, and oppressive presentence conditions. One Petitioner argues that during resentencing the court considered a prior felony conviction that, because of a

plea bargain, was not considered by the original sentencing court.[26]

Without commenting on the merits of any of the above contentions, this Court concludes that petitioners' speedy sentencing and/or due process arguments would be more appropriately handled in separate actions for the reasons that resolution of such issues would require consideration of the individual circumstances of each case.

ORDER

In accordance with the above Opinion,

IT IS ORDERED that this Court's Order of May 12, 1978, enjoining respondent from imposing the death penalty is hereby vacated, and the petition for writ of habeas corpus is dismissed.

So that petitioners may have time to appeal the Court's decision in this matter,

IT IS FURTHER ORDERED that respondent is enjoined from imposing the death penalty on any of the petitioners in the above entitled and numbered cause of action for a period of sixty (60) days from the date of entry of this Order, at which time this injunction will expire without further action by this Court.

DATED this 18th day of April, 1980, at Phoenix, Arizona.

C. A. MUECKE
Chief Judge
U.S. District Court

FOOTNOTES

1/ [Reference on page 1]

A.R.S. § 13-453 provides:

> Punishment for murder
>
> A. A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison, as determined by and in accordance with the procedures provided in § 13-454.
>
> B. A person guilty of murder in the second degree shall be punished by imprisonment in the state prison for not less than ten years. As amended Laws 1973, Ch. 138, § 2.

2/ [Reference on page 1]

A.R.S. § 13-454 provides:

> Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree
>
> A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.
>
> B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating

. . . . . .

circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsection E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment,

or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonable have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person. Added Laws 1973, Ch. 138, § 5.

3/ [Reference on page 3]

On that same day, the United States Supreme Court vacated the judgment of the Arizona Supreme Court in Jordan v. Arizona, 114 Ariz. 452, 551 P.2d 1224 (1976) "insofar as it leaves undisturbed the death penalty imposed," Jordan v. Arizona, 438 U.S. 586 (1978). It is noteworthy that the defendant in Jordan presented no evidence in mitigation at his sentencing hearing and that the issue of the constitutionality of Arizona's restriction on mitigating circumstances was not discussed.

4/ [Reference on page 3]

The most significant difference between the pre-1979

version of A.R.S. § 13-703 and its predecessor, Section 13-454, was that the more recent statute added for consideration a fifth mitigating factor: the defendant's age.

5/ [Reference on page 4]

Respondent, by his Motion to Dissolve Injunction; Motion to Vacate Order Allowing Class Action; Motion to Determine Membership of Class, filed January 9, 1980, first asked for an order vacating this Court's Order of May 12, 1978, which permitted petitioner Knapp's suit to proceed as a class action under Rule 23(b)(1) and (b)(2), Fed.R.Civ.P., for the reason that many petitioners in this action have separate actions in which the questions here presented could be handled. The Court is of the opinion that the ends of justice and judicial economy are better served by permitting this case to proceed as a class action, and therefore denies this aspect of respondent's request. This Opinion will deal with respondent's alternative motions.

6/ [Reference on page 4]

Rather than discuss all of petitioners' arguments, the Court will address only those points that the Court finds dispositive. Petitioners' remaining arguments are either individual claims better raised in individual actions or are without substantial merit. Since the arguments not discussed here are not foreclosed by this Opinion and Order, there is no prejudice to petitioners in treating them summarily.

7/ [Reference on page 5]

This language is identical to that contained in Fla. Stat. Ann. § 921.141 (Supp. 1979), which the United States Supreme Court interpreted to permit consideration of all relevant mitigating circumstances in Proffitt v. Florida, 428 U.S. 242 (1975). See note 14, infra.

8/ [Reference on page 6]

That the Arizona Supreme Court was engaging in statutory interpretation when it held that "subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F," State v. Richmond, 114 Ariz. at 204, 560 P.2d at 50, was recognized by this Court in its 1978 decision in Richmond v. Cardwell, 450 F.Supp. 519 (D.Ariz. 1978). After discussing the mitigating factors contained in subsection F, this Court stated:

> Factors absent in this statute are (to name a few), considerations of the defendant's age at the time the crime was committed, his prior record; and the amount and nature of his co-operation with authorities, whether his capacity at the time of the crime was affected by mental defect or intoxication. Theoretically, if any of the above were relevant they might by implication be considered under one of the four mitigating factors listed in the Arizona statute. However, the Arizona Supreme Court has held otherwise. In State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1977), the court held that the four mitigating factors in A.R.S. § 13-454 are exclusive. The court eliminates the possibility of implying relevant mitigating factors from the ones listed, by stating 'we hold that subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F.'

Id. at 522 (emphasis added). This Court went on to observe that:

> The inescapable conclusion is that the Arizona Supreme Court in construing the statute in question and in an attempt to prevent it from

> becoming vague and ambiguous, has defeated the respondent's position that the factors which have been omitted from the death penalty statute can be considered, where relevant, as being implied by the four enumerated mitigating circumstances.

Id. at 523.

9/ [Reference on page 6]

On rehearing, the court referred to its prior holding using similar language: "This Court, in State v. Watson, . . . held that the restriction in the showing of mitigating circumstances in the sentencing provisions of our death penalty statute, Section (D) of 13-454, was unconstitutional." 120 Ariz. at 451-52, 586 P.2d at 1263-64. Again, the court invalidates that which must be read into the statute rather than a portion of the statute itself.

10/ [Reference on page 7]

The finding that neither the language nor the legislative history of Section 13-454 demand a restrictive interpretation, see text accompanying notes 13-15, infra, and that the Watson Court was merely overruling its prior interpretations in State v. Richmond and State v. Bishop, answer petitioner's arguments that the circumstances of this case preclude the Court's use of the "doctrine of severability" as a means of constitutionalizing the statute. Watson severed nothing, save for its own prior interpretations.

11/ [Reference on page 7]

More specifically, petitioners argue that Watson's resentencing order violated the eighth amendment as a judicial imposition of a penalty or that it amounted to

judicial legislation in violation of the constitutional guarantee of a republican form of government.

12/ [Reference on page 7]

In Lockett, the Court distinguished the statute with which it was dealing from those it upheld in Jurek v. Texas, 428 U.S. 262 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), on the basis that the Ohio statute scrutinized in Lockett expressly limited the number of mitigating circumstances the sentencing court could consider. 438 U.S. at 608. Although the Jurek and Proffitt statutes were unclear as to whether the court was so limited, they had been interpreted to permit consideration of all relevant circumstances. Lockett, supra, 438 U.S. at 606-607. It was this interpretation that saved them.

13/ [Reference on page 8]

The principal case relied upon by petitioners is Baird v. Bellotti, 450 F.Supp. 997 (D.Mass. 1978), in which a federal district court held Massachusetts' abortion statute unconstitutional. That case is distinguishable on a number of grounds, one of which is the court's finding that "the Massachussetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster." Id. at 1005. Watson is not such a case. Other cases cited by petitioners include Mullaney v. Wilbur, 421 U.S. 684, 691 n. 4 (1971) ("On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.' Radio

Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945).") and Demorest v. City Bank Co., 321 U.S. 36, 42 (1943) ("Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis."). This Court's findings regarding the reasonableness of the Watson's Court's reinterpretation of its own law make it unnecessary for it to pass on the applicability of these cases to the case at bar.

Finally, petitioners cite federal cases that discuss the role of a federal court in interpreting federal statutes, see e.g., United States v. Jackson, 390 U.S. 570 (1968), and cite state cases that discuss the means by which a state court should construe state legislation, see e.g., State ex rel. Berger v. Superior Court, 106 Ariz. 365, 476 P.2d 660 (1970). The question before this Court, however, involves federal review of a state supreme court's construction of a state statute. The above cases are not directly helpful here.

14/ [Reference of page 8]

See Fla. Stat. Ann. § 921.141 (Supp. 1979). Both statutes introduce their lists of mitigating circumstances with the language "mitigating circumstances shall be the following." Neither states whether its list is intended to be exclusive or illustrative. In Lockett v. Ohio, supra, the Supreme Court noted that it "assumed, in approving the [Florida] statute, that the range of mitigating factors listed in the statute was not exclusive." Lockett, supra, 438 U.S. at 606 (emphasis added). The Court went on to state that:

> The opinion of Justices STEWART, POWELL, and STEVENS in Proffitt, supra, noted that the Florida statute 'provides that "[a]ggravating circumstances shall be limited to . . .[eight specified factors]'" and that there was 'no such limiting language introducing the list of statutory mitigating factors.' (Citations omitted.)

Lockett, supra, 438 U.S. at 606 n. 15 (emphasis in original).

While there is language in the Florida statute that might make it more conducive to nonrestrictive interpretation than Section 13-454, these differences are not particularly significant. The Supreme Court in Proffitt, supra, was dealing with the question how the state's statute should be interpreted. Here, the state court has spoken. The only remaining issue is whether the interpretation which it eventually embraced is so unreasonable as to be unconstitutional. See note 13, supra.

15/ [Reference on page 9]

Neither State v. Richmond, supra, nor State v. Bishop, supra, cited legislative history in support of their holdings. Petitioners point to two events that occurred prior to the enactment of Section 13-454 which they feel demand the conclusion that the Arizona Legislature intended that the mitigating circumstances enumerated in subsection F be exclusive. The first incident emphasized by petitioners was the legislature's failure to enact a bill submitted by Attorney General Gary K. Nelson which provided for the consideration of more mitigating circumstances than those set forth in Section 13-454. Petitioners also point to the fact that Section 13-454, as finally enacted by the legislature, omitted a provision which had been included in the version passed

by the State House of Representatives. That provision provided:

> Evidence may be presented as to any matter the sentencing panel deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances in sections b and c of this session.

Journal of the House, 31st Legislature, First Regular Session, at 499. While the above incidents might be compatible with the view that the legislature intended to restrict mitigation, they are not nearly so persuasive as to compel that conclusion.

Petitioners also find significance in the legislature's post-Watson enactment of A.R.S. § 13-703, which left Section 13-454 largely unchanged. That statute, however, was part of a revision of the entire criminal code, which went into effect on October 1, 1978. We find no indication that, in passing on Section 13-703, the legislature was voicing its rejection of Watson's conclusions as to legislative intent. In fact, the legislation could have been a reaction to the interpretation of the death penalty statute by the Arizona Supreme Court in State v. Richmond, supra, and State v. Bishop, supra. This Court finds more significance in the legislature's May 1, 1979, revision of Section 13-703, which codified the alterations made by the Watson court.

16/ [Reference on page 10]

A.R.S. §§ 1-211, et seq., sets forth the rules of statutory construction by which the Arizona courts are bound. Section 1-211 requires that the courts observe the rules set forth in Title 1, Chapter 2 " . . . unless such construction would be inconsistent with the

manifest intent of the legislature." A.R.S. § 1-211(A).

Section 1-211 also provides:

> B. Statutes shall be liberally construed to effect their objects and to promote justice.
> C. The rules of common law that penal statutes shall be strictly construed has no application to these revised statutes. Penal statutes shall be construed according to the fair import of their terms, with a view to effect their object and to promote justice.

In Watson, the Arizona Supreme Court indicated that the manifest intent of the legislture in enacting A.R.S. §13-454 was that there be a death penalty, not that the mitigating factors be limited in number. See Watson, supra, 120 Ariz. at 445, 453, 586 P.2d at 1257, 1265.

17/ [Reference on page 10]

Even when a defendant's sentence has commenced, double jeopardy does not prohibit a court from resentencing him to a different penalty where the original sentence was wholly illegal or completely void, see Bozza v. United States, 330 U.S. 160 (1947); United States v. Turner, 518 F.2d 14 (7th Cir. 1975), or where a defendant has obtained a reversal of his original conviction. See North Carolina v. Pearce, 395 U.S. at 720 ("And at least since 1919, when Stroud v. United States, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.") Moreover, in its 1899 decision in Murphy v. Massachusetts, 177 U.S. 155 (1899), cited in North Carolina v. Pearce, 395 U.S. at 720 n. 16, the Supreme Court held that the double jeopardy clause does not bar a court from

resentencing a defendant once he has successfully attacked his first sentence. In such circumstances, "it is well settled that a convicted person cannot by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy." 177 U.S. at 158.

18/ [Reference on page 12]

Petitioners also cite this Court's Opinion in Richmond v. Cardwell, supra, as well as the United States Supreme Court's decisions in Lockett v. Ohio, supra, and Jordan v. Arizona, 438 U.S. 911 (1978), as having the effect of invalidating Section 13-454 and thus reducing their sentences to life imprisonment. Richmond v. Cardwell, supra, merely enjoined the execution of those petitioners who were parties to that action. While this Court found Section 13-454, as interpreted in State v. Richmond and State v. Bishop, to be unconstitutional, its ruling in no way invalidated Arizona's sentencing statute or reduced the penalties of those who were sentenced under it. The Supreme Court's decisions in Lockett v. Ohio, supra, and Jordan v. Arizona, supra, are also inapplicable. Lockett was concerned only with the law of Ohio, and had no direct impact on the validity of Arizona's statute. In Jordan, supra, the Supreme Court stopped short of invalidating Section 13-454. It merely vacated a death sentence that had been upheld by the Arizona Supreme Court and remanded for further proceedings in light of its decision in Lockett. See note 3, supra.

19/ [Reference on page 14]

See Discussion re Judicial Legislation, supra.

20/ [Reference on page 16]

Since none of petitioners was convicted of a murder occurring between the dates of this Court's decision in Richmond v. Cardwell, supra, and the Arizona Court's decision in State v. Watson, supra, the question whether Richmond's pronouncement that Section 13-454, as interpreted, was unconstitutional, prevented that statute from serving as an "operative fact" in terms of Dobbert is not presented. Petitioners who committed murders after Watson but before the enactment of the present version of A.R.S. § 13-703 argue that Watson cannot serve as an "operative fact" within the meaning of Dobbert. This argument, however, presupposes the inability of Watson to remedy Section 13-454 -- a position the Court does not accept.

21/ [Reference on page 17]

See also Beazell v. Ohio, 269 U.S. 167 (1925) (retroactive application of a statute making a defendant's right to a separate trial depend on his ability to show good cause therefore did not violate the ex post facto clause); Thompson v. Missouri, 171 U.S. 380 (1898) (statute which changed the rules of evidence after an indictment so as to render admissible against the accused evidence previously held inadmissible held constitutional); Hopt v. Utah, 110 U.S. 574 (1884) (law permitting adverse testimony of an ex felon upheld even though such persons were not competent on the date of the defendant's crime).

22/ [Reference on page 18]

By supplemental citation, petitioners point to the recent

decision by the Supreme Court of Kentucky in Hudson v. Kentucky, No. 78 SC 563 MR (April 1, 1980), in which the court refused to permit the retroactive application of the state's newly-enacted death penalty statute to a defendant whose crime had been committed prior to its enactment. The Hudson decision, however, was purely a matter of statutory interpretation, and is inapplicable to the present case.

23/ [Reference on page 18]

In State v. Valencia, ____ Ariz. ____, 602 P.2d 807 (1979), a post-Watson ruling, the Arizona Supreme Court upheld a resentencing court's decision to consider, as an aggravating circumstance, a rape conviction which had not been entered prior to the original sentencing hearing. The rape, however, had been committed prior to that hearing.

24/ [Reference on page 18]

This Court considers this question only as it affects the constitutionality of Watson's resentencing order. The appropriateness of a particular resentencing court's use of recent aggravating circumstances within the circumstances of an individual case is properly left to separate actions.

25/ [Reference on page 19]

See generally R. MISNER, Resentencing to Death under State v. Watson: A Denial of the Right to a Speedy Trial, 2 ARIZ. ST. L.J. 137 (1979).

26/ [Reference on page 20]

See response of Petitioner Valencia.